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The Foreign Source Doctrine: Explaining the Role of Foreign and International Law in Interpreting the Constitution

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THE FOREIGN SOURCE DOCTRINE: EXPLAINING THE ROLE OF FOREIGN AND INTERNATIONAL LAW IN INTERPRETING THE CONSTITUTION

Timothy K. Kuhner*

This Article brings much-needed precision to the debate over the Supreme Court's use of foreign and international law to interpret the Constitution. The debate has been both imprecise, ignoring the subtleties of the phenomenon at issue, and prematurely abstract, jumping to theoretical and ideological levels without first looking to establish the specifics. By focusing on the particular areas of constitutional text subjected to foreign sources and the longstanding lines of caselaw upon which the use of foreign sources builds, this Article reveals that a doctrine has crystallized around the use of foreign sources. The doctrine specifies the precise uses to be made of foreign sources and the amount of authority to be bestowed upon them, and, consequently, provides a foundation upon which sensible theoretical and ideological inquiries could be based. In sum, this Article tells a story that needs to be heard, exposes the constitutional traditions underlying what is commonly but wrongly treated as a practice of activist judges, and sets the stage for productive social discourse on an important constitutional practice.

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The Supreme Court's use of foreign and international law to interpret the Constitution has become a matter of great debate in many spheres. Cases that were controversial solely on the basis of their holdings—such as those restricting the application of the death penalty and those striking down a state prohibition on homosexual sodomy¹—have become doubly controversial, even hated, because of the citations to foreign sources which led to these holdings. As evidenced by calls for impeachment of Justices employing foreign sources,² virulent dissenting opinions,³ and the Senate's vetting of Justice Alito and Chief Justice Roberts on this topic prior to their confirmation,⁴ the use of foreign sources in domestic constitutional cases has truly struck a nerve. In fact, in May 2004, the House of Representatives Subcommittee on the Constitution passed a

1. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 534 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. See Tom Curry, *A Flap Over Foreign Matter at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC, Mar. 11, 2004, <http://www.msnbc.msn.com/id/4506232/> (discussing Representative Feeney's calls for impeachment).

3. See *infra* Part I.

4. When questioned on the use of foreign law, Judge Roberts called it "a misuse of precedent" and noted that "[i]n foreign law, you can find anything you want," implying that there were no standards regarding which laws could be cited and for what purpose such citations could be made. Bill Mears, *Roberts Fields Senators' Queries for Second Day*, CNN.COM, <http://www.cnn.com/2005/POLITICS/09/13/roberts.hearings/index.html> (last visited Feb. 17, 2007) (quoting Judge Roberts). The following exchange between Senator Coburn and then Judge Samuel Alito also provides a typical example:

Senator Coburn: "[T]here's no reference at all to foreign law in terms of your obligations or your responsibility. . . . And I personally believe that [resorting to the use of foreign law is] an indication of not good behavior by a justice, whether it be a justice at an appellate division or a magistrate or a Supreme Court justice."

Judge Alito: "I don't think that we should look to foreign law to interpret our own Constitution. . . . I don't think that it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world."

U.S. Senate Judiciary Committee Holds a Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court, 109th Cong. (2006), available at 2006 WL 53273 (questioning of Judge Alito by Sen. Tom Coburn, Member, S. Judiciary Comm.).

non-binding resolution seeking to curtail the practice:

[J]udicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.⁵

Despite the energy surrounding this topic, the debate has been horribly inadequate for the tasks of comprehension and analysis. This is the particular motivation for this Article: to provide the necessary context for a productive debate to occur. Thus far, articles, public commentary, and even dissenting opinions on the use of foreign sources have systematically glossed over the precise context in which these citations to foreign sources occur—particularly, the constitutional text at issue and the prior caselaw interpreting that text; additionally, there has been an overemphasis on competing theoretical and ideological concerns which, absent proper contextualization, defy reason. Only by tracing the development of caselaw interpreting the portions of constitutional text that have led to the citation of foreign sources can the nature of this phenomenon be understood and evaluated. After all, how can one assess “judicial activism” without reference to the relevant constitutional text and caselaw? How can one claim that our country will be taken over by foreign law without looking to the caselaw and assessing precisely what role foreign law has played, and how much weight it has been accorded? Is it sensible to claim that our legal traditions are being eroded without asking whether the use of foreign law is related to our constitutional traditions? In sum, little attention has been paid to what is actually happening and, consequently, the public debate is unlikely to generate understanding, consensus, or introspection within society. Quite the contrary: confusion and politicization abound.

This Article makes two major contributions to the interrelated goals of understanding and evaluating the Supreme Court’s practice of consulting foreign sources in domestic cases. First, it provides the necessary contextual background for an informed discussion by grounding the issue of foreign sources in specific areas of constitutional

5. H.R. RES. 568, 108th Cong. (2004). Representative Feeney’s non-binding “Reaffirmation of American Independence Resolution” was originally introduced as H.R. RES. 97, 108th Cong. (2004). For documents and a witness list regarding the hearing, see House Committee on the Judiciary, Hearings, <http://judiciary.house.gov/Hearings.aspx?ID=27> (last visited Feb. 1, 2007). See also Representative Tom Feeney, Sponsored Legislation, <http://www.house.gov/feeney/sponsoredlegislation.shtml> (last visited Feb. 1, 2007); Curry, *supra* note 2.

text and caselaw interpreting that text. There is in fact a story to be told, for the Court's use of foreign sources arose neither suddenly nor randomly. Second, by synthesizing the relevant caselaw, this Article reveals the salient features of the practice and shows that it has in fact crystallized into a doctrine, which I hereby term the foreign source doctrine. Understanding the terms of this doctrine proves useful for testing several theories that seek to determine whether the use of foreign sources is more of a legal phenomenon than a political one.

My thesis is that the use of foreign sources constitutes a well-justified doctrine that builds on important traditions in the Supreme Court's due process and cruel and unusual punishment jurisprudence. I demonstrate this through a narrow, context-specific analytical approach, which I believe to be warranted by the simple premises of common law analysis. In the course of this Article, it will become clear that the practice of consulting foreign and international law in domestic cases cannot be understood unless the Court's references to foreign law are disaggregated—that is, examined in the specific context of the constitutional text in question and the past opinions interpreting that text. We should not, at least as a starting point, ask whether it is appropriate for the Court to use foreign sources to interpret the Constitution, but rather whether it is appropriate for the Court to use foreign sources to interpret the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, the Copyright Clause of Article One, and so on. Furthermore, the first track in analyzing this strand of jurisprudence should not be ideological or theoretical—for example, whether vague (and often misplaced) notions of sovereignty or democratic legitimacy permit these constitutional choices⁶—but rather dutiful and relatively formalistic. This means the first task is to grapple with the constitutional text itself and the cases that interpret that text.

Although I touch on the positions taken by members of Congress and the Supreme Court, I do not in the course of this Article give due consideration to the many broad views on foreign sources espoused by legal academics. This is no accident, for these broad views cannot be evaluated without the sort of context provided in this Article. I am concerned with providing a detailed, case-specific analysis upon which

6. See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58 (2004) (discussing the problems of democratic legitimacy arising from allowing foreign views to thwart domestic majoritarian views); John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385, 387 (2004) (arguing that even "some type of deference" to foreign decisions constitutes a "transfer [of] federal authority to bodies outside the control of the national government.").

an evaluation of broad theories can be based.

In terms of this Article's first contribution, I insist on and aim to establish the following with regard to the foreign source doctrine: Constitutional duty in a government of laws requires that the first question about the practice at issue be whether such choices are justified in terms of the caselaw upon which they build and the language of the constitutional text they interpret. Once this aspect of the issue is fleshed out, then it makes sense to move to the more abstract implications of the Court's citations to foreign sources. This is not to say that theoretical and ideological aspects of constitutional doctrine are unimportant. Rather, it is to say that in order to be useful, the complex realms of theory and ideology ought not to be invoked prior to rigorous observation of the phenomenon at hand. Otherwise, theory will not produce additional understanding, and this is, after all, the goal of any theory. Once that elemental task of rigorous observation has been conducted, then theoretical positions can be usefully focused on particular lines of cases and sections of constitutional text in order to increase knowledge and to make the debate intelligible and susceptible to broad, principled participation. Otherwise, we enter the ever-enlarging realm of punditry and obfuscation.

In terms of this Article's second contribution, I show that beneath the morass of sparring majority and dissenting opinions there lurks a relatively consistent doctrine. The controversy has centered on the Court's most recent citations to foreign sources. These came in *Atkins v. Virginia*⁷ and *Roper v. Simmons*,⁸ which held unconstitutional the death penalty in application to the mentally retarded and juveniles, and *Lawrence v. Texas*, which struck down a state statute prohibiting homosexual sodomy.⁹ Collectively, these cases feature references to foreign laws, international laws, and the positions of foreign bar associations. Four attributes of these references to foreign sources must be highlighted: first, they have occurred in purely domestic disputes, by which I mean cases where no foreign parties, foreign territory, or tangible extraterritorial effects were implicated;¹⁰ second, these

7. 536 U.S. 304 (2002) (holding death penalty unconstitutional when applied to the mentally retarded).

8. 543 U.S. 551 (2005) (holding death penalty unconstitutional when applied to juveniles).

9. 539 U.S. 558 (2003).

10. Cases involving foreign relations, the war on terrorism, or international law are not examined here because they are not fairly termed "domestic disputes." See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (discussing the legality of indefinite detention of a U.S. citizen pursuant to the war on terrorism); *Rasul v. Bush*, 542 U.S. 466 (2004) (facing the question of jurisdiction over the claims of foreign nationals held at Guantanamo Bay); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (touching on the Alien Tort Claims Act); *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (construing the

references have been made in order to ascertain the meaning of constitutional language; third, references such as these have occurred consistently in Eighth Amendment and Due Process cases; and, fourth, such references build on language from constitutional caselaw dating back over a hundred years. These four attributes elevate these references to the level of constitutional doctrine.

The most politically inflammatory (and legally questionable) aspect of the Supreme Court's consultation of foreign sources is the context in which the practice has repeatedly occurred: cases where foreign parties, foreign territory, or matters of direct foreign concern are not implicated. In contrast to such purely domestic cases, everyone expects the Court to reference foreign or international law in cases concerning the meaning of a treaty or the legality of extraterritorial conduct, for example.¹¹ Most people, legal commentators included, cannot fathom the relevance of foreign law to domestic constitutional issues. Its relevance will, however, become clear through an examination of the caselaw.

The foreign source doctrine holds that it is permissible to consult foreign and international law and opinion in purely domestic cases where the Court must determine whether the U.S. Constitution bans as cruel and unusual or as a denial of due process a law or governmental practice from which a plaintiff claims relief. The doctrine currently has not yet been invoked by the Court for the purpose of lowering existing constitutional protections or for the purpose of ruling that a potential expansion of constitutional protections is unjustified. Rather, it has served to buttress lines of constitutional analysis through which civil rights protections have been strengthened. Within the doctrine's legal foundation can be found a narrow class of hypothetical cases where references to foreign sources could properly be used to lower civil rights protections or to conclude that an expansion thereof is unwarranted. This too will be explained in due course.

The foreign source doctrine is not one of those legal principles that is clearly stated by the Court or grasped by commentators; however, its existence is descriptively verifiable and normatively secure. By this, I mean that finding the doctrine in the caselaw does not require embellishment, and the doctrine is easily justified in terms of

Warsaw Convention in regards to airliner liability for a passenger's death). It is logical, under standard precepts, that foreign or international law would arise in such matters. In the domestic cases examined in this Article, on the other hand, standard precepts are disturbed by the Court's citation of international and foreign laws.

11. See, e.g., *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (involving foreign territory, foreign nationals, and the Geneva Conventions); *Sosa*, 542 U.S. at 692 (involving a foreign national, a kidnapping on foreign territory, and a U.S. law that references the law of nations); *Breard v. Greene*, 523 U.S. 371 (1998) (involving a foreign national and a treaty on consular rights).

constitutional principles. The great enemy of the foreign source doctrine, and the principal obstacle to its comprehension, is any across-the-board acceptance or rejection of foreign sources in constitutional interpretation. By suggesting that foreign sources are always relevant or never relevant to interpreting the constitution, some members of the Supreme Court have erred. Such broad approaches to the issue tend to appear as a “thick theory” premised on deep-seeded legal or social assumptions. Broad approaches have been the most visible, despite finding little support in the caselaw. Members of Congress, the Justices themselves, and commentators are prone to making such broad claims,¹² and have suggested that foreign and comparative analysis has no place in the Court’s jurisprudence or, conversely, that it may be central to the future of U.S. constitutional law.

This Article is organized as follows. First, I discuss the caselaw at issue, emphasizing the areas in which the Court has most frequently used foreign materials—the Eighth Amendment and the Due Process Clause. I also comment briefly on federalism and copyright law. Second, by synthesizing these cases, I delineate the contours of the foreign source doctrine and substantiate my thesis that foreign sources have a legitimate role in interpreting certain, but not all, constitutional provisions. Third, I offer several theories that seek to explain the foreign source doctrine from the vantage point of the narrow approach discussed. Fourth, I discuss how the broad positions taken by members of the Court and the Congress could benefit from a narrower approach. In conclusion, I discuss the importance of moving beyond the narrow approach elaborated here and identify directions for future research.

I. ISSUE-BY-ISSUE ANALYSIS OF THE COURT’S USE OF FOREIGN AND COMPARATIVE LAW: DETERMINING THE NATURE AND PROPER SCOPE OF THE FOREIGN SOURCE DOCTRINE

This Part of the Article presents the caselaw that defines the Court’s use of foreign sources in domestic cases. Discussion is mostly limited to those cases in which the majority or plurality opinion employs foreign sources, for it is this body of caselaw that gives shape to a widely-adhered to legal principle, a doctrine.¹³

In the 1884 case of *Hurtado v. California*, the Court decided that the Due Process clause of the Fourteenth Amendment does not require a

12. See *infra* Part III.

13. Thus, I exclude from my analysis cases where a minority of Justices referenced foreign sources. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J., concurring) (discussing the International Convention on the Elimination of All Forms of Racial Discrimination).

grand jury indictment in a felony prosecution.¹⁴ Most of the Court's analysis addressed the meaning of "due process" in the Magna Charta and Lord Coke's commentary on the same.¹⁵ The Court noted that "owing to the progressive development of legal ideas" the words of the Magna Charta acquired new meaning over time and that the document's meaning had evolved by the time of the American colonies' separation from England.¹⁶ But despite this specification, the Court did not want to fix the meaning of due process in this particular moment. Instead, it rooted the meaning of "our 'ancient liberties'" in the "forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government."¹⁷ The Court linked the "true philosophy of our historical legal institutions" with the common law's "flexibility and capacity for growth and adaptation,"¹⁸ and then went on to endorse the use of comparative law in constitutional interpretation as, ostensibly, an element of that flexibility and capacity:

The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the

14. 110 U.S. 516, 531 (1884).

15. *Id.* at 521–32.

16. *Id.* at 529 (“[O]wing to the progressive development of legal ideas and institutions in England, the words of *Magna Charta* stood for very different things at the time of the separation of the American colonies from what they represented originally.”).

17. *Id.* at 530 (“[I]t is better not to go too far back into antiquity for the best securities for our ‘ancient liberties.’ It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.”).

18. *Id.*

new and various experiences of our own situation and system will mould and shape it into new and . . . useful forms.¹⁹

Although the Court was here pushing to gain some space for independent American meanings and experience separate from those of the Mother Country and its laws, the philosophy of balancing the law's fidelity to its own roots with openness to the *best ideas of all systems* and *various fountains of justice* would remain relatively constant. Justice Benjamin N. Cardozo, some fifty years later, would give enduring expression to this philosophy in *Palko v. Connecticut*.²⁰

In this 1937 case, the Court drew a line between rights that are "implicit in the concept of ordered liberty, and thus. . . valid as against the states" and those that are not.²¹ In denying Frank Palko's claim that he had been deprived of his Fourteenth Amendment due process rights by being tried twice for the same crime,²² Justice Cardozo offered a "rationalizing principle" that serves as the criterion for determining which side of this line any given right will fall: "[certain rights are not part of] the 'very essence of a scheme of ordered liberty' [and therefore] [t]o abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"²³ In attempting to define such rights, Justice Cardozo ventured that a "fair and enlightened system of justice would be impossible without them."²⁴ Importantly, this opinion builds on the tradition of grounding the meaning of Due Process in the context of our nation's heritage and the broader traditions of civilized society in relation to which we, even as we chart our own evolution as a distinct polity, must continue to orient ourselves.

Fifty-one years later, Justice Antonin Scalia cited *Palko* in describing the only sense in which he would take account of the practices of other nations in interpreting the U.S. Constitution:

The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of

19. *Id.* at 530–31.

20. 302 U.S. 319 (1937).

21. *Id.* at 325.

22. Mr. Palko was first convicted of second-degree murder, but later retried and convicted of first-degree murder for the same act. *Id.* at 321.

23. *Id.* at 325.

24. *Id.* Justice Cardozo died the next year. *Palko* is one testament to his judicial philosophy, one relevant aspect of which he gave to us in these words: "The great generalities of the Constitution have a content and a significance that vary from age to age. The method of free decision sees thru the transitory particulars and reaches what is permanent behind them." BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (1921).

ordered liberty” that it occupies a place not merely in our mores but, text permitting, in our Constitution as well.²⁵

To Justice Scalia, other countries’ practices were relevant to the U.S. Constitution only if those same practices and laws were already uniformly observed by “our people.” If so, then this coincidence indicates that such practices and laws are essential to the scheme of ordered liberty referred to by Justice Cardozo, and therefore deserving of elevated constitutional status. In Justice Scalia’s view, citations to foreign laws are irrelevant unless those laws duplicate existing U.S. provisions. One year later in 1989, this view commanded a majority of the Court in *Stanford v. Kentucky*.²⁶

The majority of the Court had taken a broader approach to foreign and comparative legal analysis between *Palko* and *Stanford*. The broader approach has regained prominence in the last four years through such controversial cases as *Atkins v. Virginia*,²⁷ *Lawrence v. Texas*,²⁸ and *Roper v. Simmons*.²⁹ Yet, the effect of the Court’s current, more permissive use of foreign law and practice in constitutional interpretation means different things in each of these cases. *Lawrence* is a substantive due process case, while *Atkins* and *Roper* interpret the Eighth Amendment. It is not surprising that the use of foreign law in constitutional interpretation is an area of great confusion. Justice Scalia imported a due process standard of analysis from *Palko* into the Court’s Eighth Amendment jurisprudence through his majority opinion in *Stanford*.

There are in fact four separate questions in play: First, in what ways is foreign or comparative legal analysis relevant to interpreting the Eighth Amendment? Second, in what ways is this same type of analysis relevant to the task of interpreting the Due Process clause? The final two questions are of less significance given the scarcity of case law: whether such foreign and comparative analyses are relevant to interpreting the federalist structure or the Copyright Clause. These

25. *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting).

26. 492 U.S. 361, 370 n.1 (1989) (“We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant. While “[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so “implicit in the concept of ordered liberty” that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,” . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.” (internal citations omitted)).

27. 536 U.S. 304 (2002).

28. 539 U.S. 558 (2003).

29. 534 U.S. 551 (2005).

questions are examined here in the order described.

A. The Use of Foreign and Comparative Law to Interpret the Constitution: The Eighth Amendment

1. Case Law

In *Trop v. Dulles*, decided in 1958, a plurality of the Court held that the Eighth Amendment prohibits expatriation as a form of punishment.³⁰ This is a landmark case, establishing that the contours of the Eighth Amendment can be determined through reference to the practice of other countries. Albert Trop was convicted of desertion by a military court and sentenced to expatriation pursuant to a statute enacted by Congress under its war powers. The Court remarked that the condition of statelessness is “deplored in the international community of democracies,” citing a United Nations study.³¹ The Court relied heavily on the practices of other countries in finding an Eighth Amendment violation: “The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”³²

The plurality’s rationale for considering the practices of other nations in its interpretation of the Constitution emanates from a conception of the Eighth Amendment recently reaffirmed by a majority of the Court in 2002.³³ Though the *Trop* plurality conceded that the death penalty could be imposed on deserters without offending the Eighth Amendment, it noted that “the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.”³⁴

To determine the constitutionality of expatriation as punishment, the plurality asked whether expatriation “subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”³⁵ The opinion specified that the Eighth

30. 356 U.S. 86 (1958). *Trop* is the only case examined where the act in controversy occurred on foreign soil. This Article examines uses of foreign and comparative precedent by the Supreme Court in cases whose jurisdictional nature does not so require. This case is in fact no exception. As the plurality stated, “[t]he fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.” *Id.* at 92.

31. *Id.* at 102 (citing Study on Statelessness, U.N. Doc. E/1112 (1949); Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, 32 POL. SCI. Q. 137 (1917)).

32. *Id.*

33. This more recent articulation of the Eighth Amendment’s meaning will be discussed below. See analysis of *Atkins v. Virginia*, *infra* notes 59–72.

34. *Trop*, 356 U.S. at 99.

35. *Id.*

Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁶ The plurality defined this notion of civilized treatment in relation to the views of the “civilized nations of the world,” underscoring its view that the fundamentals of the Eighth Amendment relate to a broad concept of human dignity: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”³⁷ This language is truly remarkable in that it posits that the Constitution ensures a measure of dignity potentially transcendent of U.S. values. Indeed, the plurality referenced the “Anglo-American tradition of criminal justice.”³⁸ It noted further that the phrase “cruel and unusual punishment” was a direct transplant from the English Declaration of Rights of 1688, and that the notion of human dignity derives from the Magna Charta.³⁹

The plurality did consider that, despite the international consensus regarding statelessness, some countries allow expatriation.⁴⁰ In dissent, Justices Frankfurter, Burton, Clark, and Harlan quarreled with the assertion that there was in fact an international consensus on the topic, citing a competing portion of another United Nations document.⁴¹ Notably, they did not quarrel with the plurality’s mode of interpreting the Eighth Amendment in reference to other nations’ practices.

The method of Eighth Amendment interpretation outlined in *Trop* achieved increasing acceptance by Supreme Court majority opinions up until *Stanford v. Kentucky* in 1989.⁴² These opinions were handed down in *Coker v. Georgia*,⁴³ *Enmund v. Florida*,⁴⁴ and *Thompson v. Oklahoma*.⁴⁵ The Court held in *Coker* that the imposition of the death penalty for rape violated the Eighth Amendment’s prohibition on cruel and unusual punishment. The majority discussed *Trop*’s reference to

36. *Id.* at 101.

37. *Id.* at 100.

38. *Id.* (“The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”) (internal citations omitted).

39. *Id.*

40. *Id.* at 102–03 (“It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. . . . The United Nations’ survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.”) (citing Laws Concerning Nationality, U.N. Doc. ST/LEG/Ser.B/4 (1954)).

41. *See id.* at 126 (“Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities.”) (citing Laws Concerning Nationality, *supra* note 40).

42. 492 U.S. 361 (1989).

43. 433 U.S. 584 (1977).

44. 458 U.S. 782 (1982).

45. 487 U.S. 815 (1988).

other nations' practices only in a footnote and gave it limited effect: "It is thus *not irrelevant* here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape. . . ."⁴⁶ The *Enmund* majority gave limited effect to *Trop* in this same regard in their ruling that the Eighth Amendment does not permit the attribution of culpability for a murder to accomplices who did not kill, attempt to kill, or intend the killing to take place.⁴⁷ They cited *Coker's* treatment of *Trop* verbatim in a footnote where they characterized the abolishment and restriction of the felony murder doctrine in a range of countries as "worth noting."⁴⁸

The full adoption of *Trop's* principles, specifically its conception of the Eighth Amendment as tied to civilized standards of decency, came in 1988. The majority in *Thompson* discussed the views of "other nations that share our Anglo-American heritage" and "leading members of the Western European community," as well as those of a host of other countries regarding the execution of juveniles and the death penalty in general.⁴⁹ This discussion was characterized as strengthening the Court's conclusion that "civilized standards of decency" would be offended by executing someone who was under 16 years of age at the time of their offense.⁵⁰ This discussion occupied over one page of text in the Supreme Court reporter and included several footnotes, among them a reference specifically to *Trop*. This is significant because the discussion took place in the text of the opinion, rather than in a footnote, and the citation was made directly to *Trop*, and only secondarily to *Enmund* and *Coker*. In dissent, Justice Scalia wrote that "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the

46. *Coker*, 433 U.S. at 596 n.10 (citing DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, CAPITAL PUNISHMENT 40, 86 (1968) (emphasis added).

47. *Enmund*, 458 U.S. at 801.

48. *Id.* at 796 n.22 ("[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.' It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.") (citing *Coker*, 433 U.S. at 596 n.10) (internal citation omitted).

49. *Thompson*, 487 U.S. at 830-31 ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. . . . The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.") (internal citations omitted).

50. *Id.* at 830.

Constitution.”⁵¹

One year later in *Stanford v. Kentucky*, a majority of five Justices held that the Eighth Amendment allowed the execution of individuals for crimes committed at sixteen or seventeen years of age. Though not contrary to *Thompson’s* holding on the merits, the Court’s reasoning differed in an important respect: Justice Scalia’s view about foreign experience prevailed. The petitioners’ contention that execution in these circumstances was contrary to “evolving standards of decency” was rejected on the basis that “it is *American* conceptions of decency that are dispositive.”⁵² To leave no doubt as to the meaning of this, Justice Scalia spelled out that the Court “reject[s] the contention of petitioners . . . that the sentencing practices of other countries are relevant.”⁵³ Justice Scalia’s opinion implied that members of the Court comprising the majority in the cases prior to *Stanford* had looked to the practices of other nations simply because they were consistent with those Justices’ own conceptions of decency.⁵⁴

Notably, this opinion defined cruel and unusual punishment in relation to the practices accepted by the American people, stating in no uncertain terms that the Court’s job is “to *identify* the ‘evolving standards of decency’; to determine not what they *should* be, but what they *are*.”⁵⁵ Also of note, it confined the relevance of other nations’ practices in determining whether a constitutional norm has reached a high enough status to be valid against the States in the due process context, as discussed by Justice Cardozo in *Palko*.⁵⁶ In dissent, Justices Brennan, Marshall, Blackmun and Stevens (the *Thompson* plurality) debated this point. They insisted that “the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society”⁵⁷ and that such “objective indicators of contemporary standards of decency” are recognized as relevant by past Eighth Amendment cases.⁵⁸

The *Stanford* dissenters’ view became the law once again thirteen years later in *Atkins v. Virginia*. Justice Stevens, the last *Stanford*

51. *Id.* at 868, n.14.

52. *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989).

53. *Id.*

54. *Id.* at 370 (“In determining what standards have ‘evolved,’ however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole.”). This is the sentence to which the footnote regarding foreign nations’ practices was appended.

55. *Id.* at 378.

56. This second notable aspect of the case is therefore clearly dicta, since no due process challenge was presented in *Stanford*.

57. *Stanford*, 492 U.S. at 384.

58. *Id.* at 389.

dissenter remaining on the Court, wrote an opinion joined by five other justices holding that the Eighth Amendment prohibits the execution of the mentally retarded. *Atkins* establishes that Justice Warren's plurality opinion in *Trop* is now the law. The Court reaffirmed that it is "nothing less than the dignity of man" that underlies the Eighth Amendment and that this portion of the Constitution "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵⁹ At this point, early in the opinion, the *Trop* conception of the Eighth Amendment had been reasserted, such that the reference to foreign practice in footnote twenty-one came as no surprise: "[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."⁶⁰

This is a humble citation to foreign law and practice. Aside from being relegated to a footnote, the practices of the world community were described as "by no means dispositive" and simply "lend[ing] further support to [the majority's] conclusion that there is a consensus among those who have addressed the issue [of capital punishment of the mentally retarded]."⁶¹ Moreover, the footnote at issue was attached to the concluding sentence of a lengthy analysis of domestic legislative changes since *Penry v. Lynaugh*, decided in 1989.⁶² The famous footnote twenty-one of *Atkins* is in fact attached to the final sentence of the material portion of the court's analysis. It reads: "The practice [of applying capital punishment to the mentally retarded], therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."⁶³

Despite the limited practical effect of the majority's reference to the world community (merely reinforcing an already existing national consensus), a matter of principle is certainly implicated. Chief Justice Rehnquist and Justice Scalia wrote two dissenting opinions. The

59. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

60. *Id.* at 316 n.21.

61. *Id.*

62. In *Penry*, 492 U.S. 302 (1989), the Court held that a congressional and state statute prohibiting such executions, along with the rejection of the death penalty by fourteen U.S. states provided insufficient evidence of the required "national consensus" against the practice. *Id.* at 334. The *Atkins* opinion's lengthy analysis of legislative enactments since *Penry* occupies pages 314–317 of the opinion. The Court's explanation for its holding at the outset of the opinion also characterizes domestic legislative change as determinative. *Atkins*, 536 U.S. at 307 ("[I]n the 13 years since we decided *Penry v. Lynaugh* . . . the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case.")

63. *Atkins*, 536 U.S. at 316 (emphasis added).

primary message of each is that the views and practices of the world community are irrelevant and contrary to the Court's precedents,⁶⁴ though the basis for this message varies between them. Chief Justice Rehnquist stated that the "suggestion that [foreign laws] are relevant to the constitutional question. . . is antithetical to considerations of federalism."⁶⁵ He based this assertion on a passage in *Stanford* expressing the need for rules binding on government to be facially present in the laws approved by the people.⁶⁶ More poignant is Chief Justice Rehnquist's rather sincere question as to why other countries' views are relevant if the Court is seeking to determine whether a national consensus exists.⁶⁷

A more difficult portion of Chief Justice Rehnquist's opinion is that regarding the proper function of international opinion. He cites *Thompson, Edmund* and *Trop* for the proposition that "some of our prior opinions have looked to 'the climate of international opinion'. . . to reinforce a conclusion regarding evolving standards of decency."⁶⁸ This is a fair assessment. Then, as if to imply that the majority had superseded this limited use of international opinion, he writes that "we have since explicitly rejected the idea that the sentencing practices of other countries could 'serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.'"⁶⁹ Justice Scalia, who joined Chief Justice Rehnquist's opinion and vice-versa, clarified in his own dissent what is likely the message behind this somewhat cryptic allegation.⁷⁰

Though part of Justice Scalia's criticism was directed at the majority's citation to professional and religious organizations, he took greatest exception to the survey of foreign nations' practices. He characterized these methods as deserving of "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus,'" using capital

64. *Id.* at 322 (Rehnquist, C.J., dissenting); 347-48 (Scalia, J., dissenting).

65. *Id.* at 322.

66. *See id.* at 322 (Rehnquist, C.J., dissenting) ("The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any 'permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved.'").

67. *Id.* at 324-25 (Rehnquist, C.J., dissenting) ("I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. . . . For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant.").

68. *Id.* at 325 (Rehnquist, C.J., dissenting).

69. *Id.* (citing *Stanford*, 492 U.S. at 368 n.1) (alteration in original).

70. *Id.* at 347-54 (Scalia, J., dissenting).

letters to emphasize his point.⁷¹ It was in fact necessary to frame his objection in terms of an allegation of artifice, since the majority was clear that its use of international opinion served only to determine what is “unusual” and reinforce an existing national consensus (see above). Justice Scalia then went on to state what is safely the most heated objection to the Court’s reference to foreign countries:

Equally irrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. “We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”⁷²

Yet, even this fervent objection contains a limiting principle. Justice Scalia implies that if there were a settled national consensus, then the views of foreign countries could be taken into account. He stated this openly in *Thompson*, confusing the *Palko* due process standard with an Eighth Amendment standard.⁷³ Of course, if there were a clear national consensus, the views of foreign countries would presumably be irrelevant, which is a restatement of Chief Justice Rehnquist’s concern above (regarding why the majority cited to foreign practice if it claimed to be doing so only to support a national consensus it regarded as clear).

But the most significant use of foreign law would not surface for another three years. In *Roper v. Simmons*,⁷⁴ decided in March 2005, the Court abolished the imposition of the death penalty on individuals who were under the age of eighteen at the time of their offense. There, Justice Kennedy, in an opinion joined by Justices Stevens, Souter, Ginsburg, and Breyer, devoted a full two pages of foreign law analysis and jurisprudential commentary justifying the same.

The Court adhered to the basic *Atkins* rule of world opinion and foreign law being useful for nothing more than lending support for Court’s pre-formed conclusion on the matter. The majority opinion

71. *Id.* at 347 (Scalia, J., dissenting) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868–69 (1988) (Scalia, J., dissenting)).

72. *Id.* at 347–48 (Scalia, J., dissenting).

73. *Thompson*, 487 U.S. at 869 n.4 (“The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. . . . But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (internal citations omitted)).

74. 543 U.S. 551 (2005).

explained: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."⁷⁵ This explicit, abstract statement seemed at first glance a restatement of an earlier and more material portion of the opinion, which reads as follows:

Our determination that the death penalty is disproportionate for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility.⁷⁶

Thus far, the two statements match up. But in the very next sentence, the Court continued as follows: "Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"⁷⁷ If foreign sources solely serve to confirm pre-existing interpretations of the Eighth Amendment, one would not describe such sources as "instructive for interpretation." This phrase states that such sources aid the court in *interpreting*—that is to say that they help in the process through which the Eighth Amendment's meaning is determined. Indeed, the term "instructive" relates to the noun "instructions" and would thus seem to imply giving direction to, orienting, or otherwise actively aiding in the interpretive process. This formulation does indeed contest the idea of foreign sources in the ancillary role of lending support, but not giving directions.

The *Roper* majority's analysis of foreign law dwarfs footnote 21 in *Atkins* and will likely invite further doubt on the merely ancillary function of foreign law. It does so not so much through detail, although detail abounds, but rather through the type of detail emphasized and the tone employed. "[I]t is fair to say," writes the majority, "that the United States now stands alone in a world that has turned its face against the juvenile death penalty."⁷⁸ A dispassionate formulation might not have gone beyond the empirical: the United States is essentially the only country not to abolish or disavow the juvenile death penalty. And yet, the majority opinion does not merely tally the number of nations in favor and against. Emphasizing the unsavory bedfellows the U.S. has made by continuing the practice, it does more than this. It notes that Somalia

75. *Id.* at 578.

76. *Id.* at 575.

77. *Id.*

78. *Id.* at 577.

is the only other country not to ratify the relevant provision of the Convention on the Rights of the Child, and that even Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China (all of which having carried out such executions since 1990) have since abolished or renounced the juvenile death penalty.⁷⁹ The majority also discussed the United Kingdom's experience at length.⁸⁰

The majority prefaced several portions of its analysis along these lines by mentioning how respondents and *amici* had brought the information to light. Although this suggests that the Court might not have thought to unearth the information on its own, and thus seems to weaken the jurisprudential value of the citations to foreign sources, one must identify the *amici* before drawing this conclusion. Friends of the court identified by name in the opinion include the European Union, Jimmy Carter, a slew of former U.S. diplomats, and the Human Rights Committee of the Bar of England and Wales. To name and entertain within the text of an opinion the contentions of a supranational government and a committee of a foreign bar in a case not involving foreign parties, foreign territory, or a matter that affects any cognizable foreign interests is to signal great openness to world opinion. Moreover, the domestic actors cited—a former president and former diplomats—are known to be uniquely concerned with international opinion and the process of reconciling U.S. policy with the same.

The majority, now self-conscious and aware of its place in a culture war, took great pains to justify its approach to foreign law and opinion. First, it offered a lengthy string of citations to past Supreme Court cases taking the same approach. Second, the Court offered patriotic rhetoric designed to respond to its critics and to win readers over to its approach. "It does not lessen our fidelity to the Constitution," wrote Justice Kennedy, "or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."⁸¹ This concept of a "heritage of freedom" places the Eighth Amendment in that broader context advocated by the majority.

Justice Stevens wrote separately simply to emphasize that the Eighth Amendment must be interpreted in light of evolving standards of

79. *Id.*

80. The United Kingdom's experience was said to be of "particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins." *Id.* Indeed, the Eighth Amendment itself is what comparative law scholars call "transplanted law," that is, law taken from one cultural and legal environment and planted in another. It was copied almost verbatim from the English Declaration of Rights of 1689. See *Weems v. United States*, 217 U.S. 349, 377, 394–95 (1910).

81. *Roper*, 543 U.S. at 578.

decency and is as such a living Constitution. He noted that, had its meaning been frozen when first drafted, "it would impose no impediment to the execution of 7-year-old children today."⁸² This principle was also affirmed by Justice O'Connor, although she dissented.⁸³

Justice O'Connor also affirmed the principle that foreign laws and practices could be relevant to ascertaining the meaning of the Eighth Amendment. She did, however, put forth only qualified support for considering foreign sources, noting that it was appropriate only in a situation where a national consensus against the challenged practice had already developed.⁸⁴ Thus, she took a page from Justice Scalia's dissenting opinion in *Atkins*.⁸⁵ Justice O'Connor's opinion demonstrates, however, that the majority view on the role of foreign law and practice does not necessarily require that a human-rights restrictive state law be overturned. Ever the bridge between the two polarized halves of the Court, Justice O'Connor here exemplified a middle road likely to be erased from the maps by her replacement, Justice Alito.⁸⁶

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, vehemently sketched out the map likely to be asserted by the new majority of the Court the next time a case arises with any bearing on foreign and international opinion. More significantly, however, the opinion attacks the larger philosophy of which the use of foreign law is but one small implication: that the Constitution is a living document. It is of course true that consultation of foreign laws could be considered an originalist position, owing to the philosophies and practices of the framers themselves.⁸⁷ But as a matter of jurisprudence, the use of foreign laws has come to be associated with the activity of interpreting the Constitution in light of evolving standards of decency or, in the due process realm, a fundamental principle of justice,⁸⁸ two notions that Justice Scalia abhors for being read into the Constitution by the

82. *Id.* at 587 (Stevens, J., concurring).

83. *Id.* at 589 (O'Connor, J., dissenting) ("It is by now beyond serious dispute that the Eighth Amendment's prohibition of 'cruel and unusual punishments' is not a static command.")

84. See *id.* at 604 (O'Connor, J., dissenting) ("Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court.")

85. See *Atkins v. Virginia*, 536 U.S. 305, 348 (2002) (Scalia, J., dissenting).

86. Chief Justice Roberts will likely have little bearing on the issue, as his views will likely prove duplicative of those of his predecessor.

87. See Harold Hungju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L. L. 305, 308 (2001) (noting that "[i]n the early years of the American republic, when the United States was a small nation with almost no indigenous law, America was fundamentally a law-taker and a law-borrower.")

88. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

judiciary. He writes in *Roper* that “the only legitimate function of this Court [in interpreting the evolving standards of decency] is to identify a moral consensus of the American people.”⁸⁹ Thus, he dissents on the grounds that the majority has made “a mockery” of Hamilton’s expectation of a “traditional judiciary, ‘bound by strict rules and precedents,’” an expectation that justified life tenure for judges, who were to have “neither FORCE nor WILL but merely judgment.”⁹⁰ This mockery purportedly flows from the majority’s pronouncement that *Stanford* was correctly decided under the Constitution as it stood at the time, but that the Constitution has changed in the intervening fifteen years. Justice Scalia thus rejects the notion that the meaning of the Eighth Amendment is to be construed in light of the evolving standards of decency relied upon by the majority and emphasized in Justice Stevens’ concurrence.

Justice Scalia also attacked the rather monumental notions of judicial review and the Supremacy Clause. “Worse still,” he writes, “the Court says. . . that what our people’s laws say about the issue does not, in the last analysis, matter.”⁹¹ He goes on to quote the majority’s statement that “in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” Clearly, the Supremacy clause and judicial review squarely require that laws passed by the states can be reviewed by the Court and trumped by the Eighth Amendment if a conflict arises, and equally clear is the fact that the majority of the Supreme Court decides how that short and vague text applies to any given state or federal law.

Also notable is that the dissenters claim to be able to distinguish between force and will, on the one hand, and judgment on the other.⁹² In noting that “the meaning of our Eighth Amendment. . . should [not] be determined by the subjective views of five Members of this Court and like-minded foreigners,”⁹³ they complicate matters by criticizing the concept of subjectivity. We know, objectively, that the Eighth Amendment prohibits cruel and unusual punishment, but past this point, subjective views are required to interpret its meaning. The notion of limiting oneself to judgment, and eliminating force, will, and

89. *Roper*, 543 U.S. at 616 (Scalia, J., dissenting).

90. *Id.* at 607 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

91. *Id.* at 608 (Scalia, J., dissenting).

92. *Id.* at 607 (Scalia, J., dissenting) (“Alexander Hamilton assured that citizens of New York that there was little risk in [giving life tenure to judges who could nullify laws enacted by the people’s representatives], since ‘[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment[.]’”) (quoting THE FEDERALIST NO. 78, at 465).

93. *Id.*

subjectivity begs for clarification. None is offered. The consequence is that the very concept of judicial review is placed in doubt. If the written law is intentionally vague in order to allow future generations to be involved in self-rule, how can the judiciary "say what the law is"⁹⁴ without resort to subjectivity? The grand fallacy of originalism, which is the cure implied by the dissenters, is that the founders intended their own subjective views (those lurking behind the constitutional language they did agree upon) to bind us,⁹⁵ and, even if so, that those views could in all cases be objectively determined with a sufficient degree of clarity to apply to modern, unforeseen conditions.

With regard to the topic of foreign laws specifically, Judge Scalia and company ignore the majority's explanation for consulting such laws, but nonetheless dedicate nearly four pages in the Supreme Court reporter to attacking the practice. The dissenters at times lump the entire Constitution together, instead of merely considering the Eighth Amendment's text in particular, and describe the majority opinion as allowing the views of foreigners to determine the meaning of the Constitution, as opposed to addressing the question of whether such views can confirm a conclusion about the Eighth Amendment already arrived at through traditional channels. The dissenters construe the majority opinion as stemming from the "basic premise. . .that American law should conform to the laws of the rest of the world."⁹⁶ Of course the majority specifies an entirely different premise and thus we, the Court's audience, are left with the distinct impression that although all nine members of the Court work in the same building, they have not bothered to carefully explain their views to each other. We are made to understand that this particular issue of foreign laws' relevance to the Constitution has generated disagreement vehement enough to preclude mutual understanding.⁹⁷

2. Analysis

The debate in Eighth Amendment jurisprudence is whether foreign law and practice should be taken into account in interpreting the meaning of cruel and unusual punishment. This must be underscored:

94. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

95. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

96. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting).

97. See *id.* at 628 ("The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing.").

The Court considers that practices of the world community can, in this narrow area of law, help interpret the Constitution. Specifically, the Court currently maintains that survey data regarding the types of punishment employed in foreign countries can constitute supporting evidence for the conclusion that a given type of punishment has become “unusual.” In the majority’s own words, it utilizes such evidence not to establish the existence of a national consensus, but rather as an independent weight added to the scales only once a national consensus has been established. Chief Justice Rehnquist and Justice Scalia believe that such survey data is used to “manufacture” a national consensus, where none exists *per se*.

It is difficult to imagine how the views of other countries could help establish or manufacture a national consensus. The spheres of domestic and foreign opinion are clearly demarcated and there is no danger of confusing one with the other. Domestic opinion is ascertained through the existence of legislation and, to a far more limited extent, the views of domestic professional organizations cited in footnote twenty-one. Both of these sources of information, though especially the former, are clearly domestic in character. Citizens of foreign nations do not vote in our elections or serve as state congressmen.

The true disagreement between the majority and the dissent lies in their underlying conceptions of the Eighth Amendment. The majority looks to ‘evolving standards of decency that mark the progress of a maturing society,’ an evolution towards the protection of human dignity, and the Court’s own judgment. These are among the “subjective factors” that are considered along with the “objective factor” of domestic legislative enactments by the states.

We . . . acknowledged in *Coker* that the objective evidence, though of great importance, did not “wholly determine” the controversy, “for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”

Thus, in cases involving a consensus, our own judgment is “brought to bear” by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.⁹⁸

Indeed, the Court stated that its “independent evaluation” leads it to agree with “legislatures that have recently addressed the matter.”⁹⁹ This indicates that it is not the sheer number of legislatures at issue, but rather

98. *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002) (internal citations omitted).

99. *Id.* at 321.

the direction of change. The Court concludes by recognizing that its opinion is based on this evolutionary change towards greater human dignity: "Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive. . . ." ¹⁰⁰ The law, as it now stands in the Supreme Court, is that the practices of foreign countries can lend weight to the conclusion that a practice is "unusual," or contrary to the evolving standards that inform the meaning of the Eighth Amendment.

This admonition by the Court that it construes the Eighth Amendment in light of evolving standards and that foreign practices can help show the direction of that change implicates former Chief Justice Rehnquist's concerns about federalism. Unless the Eighth Amendment is to be simply an objective survey of majoritarian preferences within the United States and nothing more, positional federalists may be unsatisfied. The Bill of Rights contains counter-majoritarian rights interpreted by unelected justices. This is the systemic architecture at hand. Aside from the fact that few (if any) constitutional norms were enacted by the present generation, the principle that the rules be "apparent" would seem to be contravened by all constitutional principles whose interpretation allows for broad judicial discretion—consider, for example, jurisprudence in the area of the commerce power or due process rights.

There are important textual and historical justifications for the broad approach to constitutional interpretation in Eighth Amendment cases. "Cruel and unusual" is a comparative phrase. It begs the question, "cruel and unusual compared to what?" Furthermore, as Chief Justice Warren noted in *Trop*, the Eighth Amendment is based on a concept of human dignity rooted in a broad historical tradition. Though many of the Constitution's provisions were transplanted from pre-existing legal traditions, not all of those provisions assume comparative or universal functions. The meaning of "speech" or "slavery" in the Amendments is not defined comparatively or in terms of a broader evolving conception of civilized society (except insofar as the Thirteenth Amendment substantively codified one such evolution).

The fact that the Eighth Amendment's Cruel and Unusual Punishment Clause is different from other clauses in the Constitution, both in terms of its wording and its history, suggests the necessity for a narrow theory of the constitutional role of foreign law and practice. It suggests the permissibility of comparative analysis here, but it by no means justifies the same in application to any other portion of the Constitution. Justice Scalia assumes that an "all or nothing" rule must obtain in order for the

100. *Id.* at 320.

Court to avoid sophistry.¹⁰¹ He writes that “[t]he Court should consider [the exclusionary rule, the Establishment Clause, and its abortion jurisprudence] in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions.”¹⁰² Although this is, once again, good rhetoric calculated to arouse the senses of Americans, it ignores the text of the Constitution as well as a long line of cases that invite such comparison in certain areas and not others.

In addition to the textual and historical justifications for this approach, one finds important policy rationales for it. A results-driven or “instrumental” reason for the Court’s approach to international law can be derived from a thought experiment. If the great majority of legislatures across the country began authorizing disembowelment, decapitation, and stoning to death as punishments for crime, it could certainly not be said that these statutes could be evidence of “evolving standards of decency that mark the progress of a maturing society.”¹⁰³ In such a case, the Court would have to look to the practices of other nations to suggest that such treatment is cruel and unusual. If the “dignity of man” is defined only in terms of how much dignity Americans are willing to afford each other, then Justice Scalia’s view is internally consistent. However, if there is to be any limiting principle (absent a substantive standard for cruel and unusual punishment), then it must be permissible for the practices of other nations to be taken into account. To say that such a thought experiment posits events so unrealistic as to be a meaningless exercise is to ignore the potential for tyranny of the majority. More concretely, such a view ignores recent precedent.

In *Ewing v. California*¹⁰⁴ and *Lockyer v. Andrade*,¹⁰⁵ the Court decided that neither a fifty-year sentence for stealing videotapes from K-Mart nor a twenty-five-year sentence without the possibility of parole for stealing golf clubs violates the Eighth Amendment. These holdings posit that human dignity is not impermissibly compromised by the practice of incarcerating people for the remainder of their lives for stealing what amounts to half of the hourly fee of a corporate lawyer.¹⁰⁶ Though the constitutionality of this practice certainly depended on the

101. *Roper*, 543 U.S. at 626–27 (Scalia, J., dissenting).

102. *Id.* at 627.

103. *Id.* at 551 (majority opinion).

104. 538 U.S. 11 (2003) (fifty-year sentence for stealing videotapes).

105. 538 U.S. 63 (2003) (twenty-five-year sentence for stealing golf clubs).

106. The value of the video tapes stolen by Andrade was \$153.54. See Linda Greenhouse, “The Supreme Court: Repeat Offenders, Justices Uphold Long Sentences in Repeat Cases,” N.Y. TIMES, Mar. 6, 2003, at A1.

absence of medieval style punishments describe above, these cases demonstrate that the character of the national consensus will not inevitably tend towards greater affirmation of human dignity. Given this, it is fundamentally important (if one wishes to entertain results-driven reasoning) that the Eighth Amendment be capable of providing greater protections than those agreed to by a majority of the citizens of any given state.

B. Constitutional Interpretation Continued: Procedural and Substantive Due Process Under the Fourteenth Amendment

1. Case Law

Palko, discussed above, involved a procedural due process claim that the Court evaluated by determining whether the right asserted was part of a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁰⁷ If so, then a “fair and enlightened system of justice would be impossible without [it],”¹⁰⁸ and the right should be valid against the states. This basic approach is well established in the Court’s jurisprudence and has both controversial and mundane applications. The mundane application can be seen in *Clark v. Arizona*, the most recent due process case at the time of this writing.¹⁰⁹ There, Justice Souter’s majority opinion noted the various approaches to insanity in traditional Anglo-American approaches, including two nineteenth-century English cases, which gave rise to the multiple standards maintained by the states. This diversity of standards compelled the majority to conclude that “no particular formulation has evolved into a baseline for due process.”¹¹⁰ This reference to foreign law does not serve to discredit any existing rule maintained by any state. The same cannot be said about two earlier due process cases whose more aggressive use of foreign law has not been set aside by any later decision.

Though Justice Scalia is the only member of the Court to propose in the Eighth Amendment context that the practices of other nations could help determine whether any given principle is in fact fundamental to our concept of ordered liberty,¹¹¹ the first citations to foreign laws in the

107. *Palko v. Connecticut*, 302 U.S. 319,325 (1937).

108. *Id.*

109. 126 S.Ct. 2709 (2006).

110. *See id.* at 2722.

111. *Thompson v. Oklahoma*, 487 U.S. 869, 821 n.4 (1988) (“The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it

Fourteenth Amendment due process context appear to have come in *Roe v. Wade*.¹¹² The effect, however, is the same. The *Roe* majority employed a historical analysis of foreign laws to show that the abortion laws in effect in the majority of U.S. states in 1973 were anomalous in 'our legal tradition.' Striking down the prohibitions on abortion required a finding that the right to abortion is a fundamental right protected under the Fourteenth Amendment, which *Palko* described as part of our "traditions and conscience."¹¹³ Given that most states prohibited abortion at the time the opinion was written, the Court had to show that such prohibitions were enacted in spite of our traditions, not because of them.

The Court conducted a lengthy review of abortion laws throughout history in part VI of its opinion. The review included a detailed survey of (i) law, religion and philosophy of the Greek and Roman era,¹¹⁴ (ii) common law from the sixteenth to eighteenth centuries,¹¹⁵ (iii) English statutory law,¹¹⁶ and (iv) the law in effect in the United States until the mid-nineteenth century.¹¹⁷ The Court began part VI of its opinion with the following words:

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in

occupies a place not merely in our mores but, text permitting, in our Constitution as well.").

112. 410 U.S. 113 (1973).

113. *Palko*, 302 U.S. at 325.

114. *Roe*, 410 U.S. at 130-31 ("Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion. . . . Most Greek thinkers . . . commended abortion, at least prior to viability.") (citing PLATO, REPUBLIC V, at 461; ARISTOTLE, POLITICS VII, at 1335b 25).

115. *Id.* at 132-33 ("It is undisputed that at common law, abortion performed before 'quickening'—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense. The absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins.") (internal citations omitted).

116. *Id.* at 136 ("England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, [in section] 1, a capital crime, but in [section] 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the 'quickening' distinction. This contrast was continued in the general revision of 1828. . . . It disappeared, however, together with the death penalty, in 1837. . . and did not reappear in the Offenses Against the Person Act of 1861. . . that formed the core of English anti-abortion law until the liberalizing reforms of 1967.") (internal citations omitted).

117. *Id.* at 138 ("In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law.").

the latter half of the 19th century.¹¹⁸

This survey of foreign laws and practices contradicts Justice Scalia's proposal, which would make such practices irrelevant unless those same practices are already uniformly observed by "our people."

Yet, the logic of the *Roe* majority is consistent with Justice Scalia's premise. If a practice uniform among Americans is also observed by other nations that share our heritage, it does indeed follow that this practice might not be a historical accident, but rather part of our "concept of ordered liberty." If this is so, then it must also be true that an American practice contradictory to long-standing traditions among the nations that share our heritage and the people whose practices informed the design of the U.S. common law architecture could be a historical accident, especially if the American practice is a recent phenomenon within this country's history. The implication is that a recent U.S. practice inconsistent with our history and the practice of nations similar to our own is probably not "so implicit in the concept of ordered liberty that it occupies a place not only in our mores, but. . . in our Constitution as well."¹¹⁹

In order to strike down a Texas statute criminalizing homosexual sodomy, the Court in *Lawrence v. Texas*¹²⁰ had to overrule *Bowers v. Hardwick*.¹²¹ Its reasoning was not that homosexual sodomy is "deeply rooted in this Nation's history and tradition" and therefore permissible, but rather that *Bowers*, and indeed the Texas Court of Appeals,¹²² erroneously made the opposite assumption—that is, that the prohibition was solidly established within the values of "our tradition" and therefore valid.

The Court characterized *Bowers*' treatment of the prohibitions on homosexual activity as overstated and incomplete.¹²³ The Court criticized the "sweeping references by Chief Justice Burger to the history of Western civilization" as ignoring "authorities pointing in an opposite direction."¹²⁴ It went on to pronounce that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be

118. *Id.* at 130.

119. *Thompson v. Oklahoma*, 487 U.S. 869, 821 n.4 (1988).

120. 539 U.S. 558 (2003).

121. 478 U.S. 186 (1986).

122. The Texas court that upheld the anti-sodomy statute had itself made reference to foreign views, citing Montesquieu, Blackstone, and Roman Law. See *Lawrence v. State*, 41 S.W.3d 349, 361 (Tex. Ct. App. 2001).

123. See *Lawrence*, 539 U.S. at 559 ("[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger there indicated. They are not without doubt and, at the very least, are overstated.")

124. *Id.* at 572.

noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”¹²⁵ In particular, the Court noted that several years before *Bowers*, the European Court of Human Rights had struck down a law prohibiting homosexual sodomy.¹²⁶ It described this decision as “at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”¹²⁷ The Court went on to cite a brief from Mary Robinson, then serving as the United Nations High Commissioner for Human Rights, detailing other nations’ protections of homosexual conduct. In light of this, it concluded that “the right the petitioners seek. . .has been accepted as an integral part of human freedom in many other countries.”¹²⁸

2. Analysis

The parallels between this analysis in *Lawrence* and the Court’s undermining of the prohibition on abortion in *Roe* are striking, but so is one key difference. The *Lawrence* opinion does not argue that the prohibition of homosexual sodomy is out of sync with our tradition and heritage, as defined in *Roe* via reference to the Greeks and Romans, and the common law tradition. Rather, it establishes that European nations disagree with the holding in *Bowers*, and that the values expressed in *Bowers* are not *currently* shared by “a wider civilization,”¹²⁹ nor were they at the time of the decision. Despite this temporal shift, the underlying use of survey data from other nations’ practices remains the same as in *Roe*: to show that the prohibition at issue does not emanate from a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹³⁰ And even more narrowly, the primary purpose of the citations to foreign practice is clearly described as that of undermining *Bowers*’ premise.

The truly important shift that occurred in *Roe* and *Lawrence* away from the reasoning in *Palko* relates to whether foreign practice can be used to undermine a prohibition or establish a right. *Palko* used the concept of “our tradition” and wider civilization to distinguish between *rights* that are “implicit in the concept of ordered liberty, and thus. .

125. *Id.* at 576.

126. *Id.* at 573.

127. *Id.*

128. *Id.* at 598.

129. *Id.* “Civilization” here of course must be understood as a narrow use of the word, referring only to nations sharing “our tradition.” Consider the significance of these words in *Palko* and *Roe*, discussed *supra* at notes 113–119.

130. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

.valid as against the states” and those that are not.¹³¹ As the Court recently held in *Washington v. Glucksberg*, rights “deeply rooted in this Nation’s history and tradition” cause the governmental prohibition on that right to be subjected to a higher degree of scrutiny under substantive due process analysis.¹³² This notion was evident already in *Palko*. The *Roe* and *Lawrence* opinions, on the other hand, focused on showing that certain *prohibitions* enacted by the states were not rooted in any such tradition, or in the case of *Lawrence*, are not now rooted in any current tradition, and are therefore not owed the same degree of deference. Justice Scalia appeared to realize that this shift had occurred. In dissent, he correctly noted that *Bowers* “rejected the claimed right to sodomy on the ground that *such a right* was not ‘deeply rooted in *this Nation’s* history and tradition.’”¹³³

The Court’s statement of its obligation in *Lawrence* shows the shift away from *Palko* and illustrates one motive for Chief Justice Rehnquist’s and Justice Scalia’s concerns: “Our obligation is to define the liberty of all, not to mandate our own moral code.”¹³⁴ This articulation is strikingly similar to one in *Atkins*: “Thus, in cases involving a consensus, our own judgment is ‘brought to bear’. . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”¹³⁵ This judicial willingness to stray from majoritarian moral codes or the preponderance of legislative enactments constitutes the heart of each opinion.

In light of this core attribute, concern over the role of foreign and comparative law in U.S. federal question cases becomes obvious. If the justices are not bound by the will of the majority, they may seek to enshrine within the Constitution foreign standards of human rights protection. It was in this vein that Justice Scalia questioned the majority’s premise that *Bowers* relied on “the views of a wider civilization,”¹³⁶ and expressed concern that the Court was “‘[impos[ing] foreign moods, fads, or fashions on Americans.’”¹³⁷ This quote could essentially be read into the Feeny Resolution cited above.¹³⁸

At most, however, this concern finds qualified textual justification in *Atkins* and *Lawrence*. In the former, foreign practices were cited in a

131. *Id.*

132. 521 U.S. 702, 721 (1997).

133. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (first emphasis added).

134. *Id.* at 579 (majority opinion).

135. *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002).

136. *Lawrence*, 539 U.S. at 598.

137. *Id.* (citing *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).

138. *See supra* note 5 and accompanying text.

footnote as “additional evidence. . .that [national] legislative judgment reflects a much broader social. . .consensus.”¹³⁹ In the latter, foreign law was cited as factual evidence that an earlier case, *Bowers*, relied on a faulty premise. In each case, therefore, the Supreme Court looked to foreign laws and practices to satisfy legal standards inherent in the Constitution: evolving standards of decency and whether something is considered “unusual” in the former, and this nation’s societal underpinnings in the latter. The use of foreign and comparative law in each instance can be construed broadly or narrowly, but is most certainly construed narrowly in the opinions themselves.

C. Two Variations: Federalism and Copyright

1. Federalism

In *Printz v. United States*,¹⁴⁰ the Court found foreign experience irrelevant to the task of determining the relationship between the Commerce Clause and the principle of state sovereignty. The majority opinion, authored by Justice Scalia, noted that “[b]ecause there is no constitutional text speaking to this precise question [whether congressional action compelling state officers to execute federal laws is unconstitutional], the answer. . .must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”¹⁴¹ Justice Scalia, in response to Justices Breyer’s and Stevens’ dissent, labeled comparative analysis “inappropriate to the task of interpreting a constitution,” though he recognized that this same judgment would not apply to the process of writing a constitution.¹⁴² To defeat the value of comparative analysis on this issue, he ventured that the systems the dissenters proposed to compare are different.¹⁴³

The dissenters suggested that despite differences between our system and others’ systems, foreign experience “may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”¹⁴⁴ In the view of the dissent, the Court can consider foreign experience while remaining faithful to the task of “interpreting

139. *Atkins*, 536 U.S. at 316 n.21.

140. 521 U.S. 898 (1997).

141. *Id.* at 905.

142. *Id.* at 921 n.11.

143. *Id.* (“The fact is that our federalism is not Europe’s.”).

144. *Id.* at 977 (Breyer, J., dissenting).

our own Constitution.”¹⁴⁵

The Court’s unwillingness to examine foreign practice in this particular area of law is consistent with its recent decisions in *Atkins* and *Lawrence*. First, there is nothing in the substantive law surrounding the Commerce Clause or state sovereignty that openly invites comparative analysis. Recall that the Eighth Amendment incorporates a comparative standard of “cruel and unusual,” which but for its constituent criteria of evolving standards of decency and human dignity might invite only domestic comparisons. Similarly, the Due Process Clause incorporates standards that require the Court to determine in any given case the meaning of a fundamental principle of justice rooted in our traditions and whether a “fair and enlightened system of justice” could exist without a certain right.¹⁴⁶ These standards not only invite, but seem in fact to require comparisons to foreign experiences. As was the case in *Printz*, no constitutional text speaks precisely to homosexual sodomy, abortion, or capital punishment; however, longstanding substantive constitutional law warrants the comparative approach in these areas.

Second, these two areas of law where foreign sources have been deemed relevant by the Court, albeit in a very narrow sense, are located within the Bill of Rights. It apparently bears repeating that these rights are intended to limit the reach of majoritarian politics, to defend the individual from the government. The Court’s posture in this area of law should emphatically be that taken in *Atkins* and *Lawrence*.¹⁴⁷ The federalism question in *Printz*, on the other hand, involved structural issues of economic and national policy more than rights. Judicial discretion is less appropriate in such questions, except as required to uphold the Constitution’s commands. This is why the following case is wrongly decided.

2. Copyright

In *Eldred*, seven Justices joined an opinion upholding the expansion of the ‘limited monopoly’ of copyright an additional twenty years beyond the life of the author. The Court held that the Copyright Term Extension Act of 1998 did not violate the “limited times” requirement in the Copyright Clause. Article I, Section 8 of the Constitution states that

145. *Id.*

146. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

147. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (“Our obligation is to define the liberty of all, not to mandate our own moral code.”); *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002) (“Thus, in cases involving a consensus, our own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”).

“[t]he Congress shall have the power. . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁴⁸ Under already-existing law,¹⁴⁹ copyrights generally lasted from the time of a work’s creation to fifty years after the author’s death. The Court afforded great deference to Congress’ interpretation of the “limited times” requirement. That interpretation is clear: Unless a law grants literally infinite temporal protection to copyright, then it is constitutional.

Of interest for the present analysis is the presence of two independent textual requirements in the Constitution on point: First, copyright protection must serve to promote art and science; second, exclusive rights must be temporally limited. If continuous fixed-term expansions for rights that already last well beyond the death of the author can hardly be said to incentivize creation (or the “progress” of the arts) and nor can granting additional rights to already copyrighted works, much less can they be said to conform to any reasonable understanding of “limited times.”¹⁵⁰ If limited times is not to be measured by human lifespan and if the fact that no person on earth will live to see certain copyrighted material come into the public domain is immaterial, then surely this constitutional requirement has been eviscerated.

The reason for discussing these two affirmative constitutional commands is that they contradict the substance of the foreign laws and practice relied upon by Congress in drafting the Act and by the Court in interpreting its provisions. The opinion notes that “a key factor in the [Act’s] passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years.”¹⁵¹ The Court then goes on to cite a law review article for the proposition that “[m]atching th[e] level of [copyright] protection in the United States [to that in the EU] can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-à-vis foreign rightholders.”¹⁵² Congressional intent behind the legislation did indeed aim to harmonize American laws with European laws, but it remains unclear why congressional intent to consult foreign laws should trump clear textual

148. U.S. CONST. art. I, § 8, cl. 8.

149. Copyright Act of 1976, 17 U.S.C. § 302(a) (2006).

150. Query whether such a use of foreign law results in a determination of constitutional meaning cognizable by an understanding of original intent. See Reaffirmation of American Independence Resolution, *supra* note 5.

151. *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003).

152. *Id.* at 206 (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and the Useful Arts*, 36 LOY. L.A. L. REV. 323, 330 (2003)) (alterations in original).

language in our Constitution. After all, the relevant European constitutions might not have contained the same limitation as our Constitution.

Thus, seven members of the Court relied on foreign law and practice to uphold the validity of legislation under the First Amendment and the Copyright Clause, despite the fact that the Constitution clearly points in the opposite direction from foreign law and practice. Justices Breyer and Stevens dissented—Justice Breyer on the express grounds that “in this case the justification based upon foreign rules is surprisingly weak,”¹⁵³ and both Justices in response to the injury caused by the Act to affirmative constitutional requirements.¹⁵⁴

That the two greatest proponents of the relevance of foreign law and practice dissented and the two greatest opponents joined the majority opinion shows rather conclusively that no broad theory of the Constitution’s relationship to foreign laws can be identified. Consider that Justice Scalia had claimed in *Thompson* that the practices of other nations were relevant only after a domestic consensus was completely formed. Here, however, he has allowed foreign laws not observed by our people to motivate a reinterpretation of our own Constitution’s “limited times” command.

II. THE FOREIGN SOURCE DOCTRINE: SUMMARY AND TYPOLOGIES

The cases show that citation to foreign sources in domestic cases has become a consistent enough and principled enough process for it to be labeled a doctrine. Part I has illustrated the following general contours from which more specific detail must be extracted: references to foreign sources have occurred in cases where no foreign parties, foreign territory, or tangible extraterritorial effects were implicated (i.e., domestic disputes)¹⁵⁵; second, these references have been made in order to ascertain the meaning of constitutional language; third, they have occurred consistently in Eighth Amendment and Due Process cases; and,

153. *Id.* at 257 (Breyer, J., dissenting).

154. *Id.* at 223–27 (Breyer, J., dissenting); *id.* at 242–43 (Stevens, J., dissenting).

155. Cases involving foreign relations, the war on terrorism, or international law are not examined here because they are not fairly termed “domestic disputes.” *Cf.* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (discussing the legality of indefinite detention of a U.S. citizen pursuant to the war on terrorism); *Rasul v. Bush*, 542 U.S. 466 (2004) (facing the question of jurisdiction over the claims of foreign nationals held at Guantanamo Bay); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (touching on the Alien Tort Claims Act); and *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (construing the Warsaw Convention in regards to airliner liability for a passenger’s death). It is logical, under standard precepts, that foreign or international law would arise in such matters. In the domestic cases examined in this Article, on the other hand, standard precepts are disturbed by the Court’s citation of international and foreign laws.

fourth, they predate the recent cases around which controversy has centered.

In this part of the Article, I distill the particular contours of the doctrine from the caselaw. To do so, I turn to three basic and essential questions, the answers to which delineate the foreign source doctrine itself. First, exactly what types of foreign sources are currently considered relevant in domestic constitutional cases—foreign opinion, other countries' domestic laws, customary international law, treaties, the precedents of international courts, perhaps others still? Second, does it matter for purposes of consulting foreign sources what provision of the Constitution is at issue? Third, how much authority is granted to foreign sources (binding, persuasive, confirmatory, or merely rhetorical and symbolic)? This third question seeks to understand the functions fulfilled by foreign sources.

A. Types of Foreign Sources Consulted

The doctrine allows for three basic types of foreign sources to be consulted: foreign law, international law, and foreign opinion. (1) Foreign law refers to the decisions of the domestic courts and legislative bodies of other states (nations). (2) International law refers to treaties, customary international law, general principles of law common to civilized nations, and the decisions of courts that have jurisdiction over disputes between nations.¹⁵⁶ The aspect in which the foreign source doctrine is a misnomer is revealed here, as some international law is not a foreign source at all, but rather a “part of our law.”¹⁵⁷ Much international law cited by the Court, however, is indeed a foreign source because it is non-binding on the United States. Consider, for example, the Convention on the Rights of the Child, which the United States has not ratified, and the decisions of the European Court of Human Rights, which lacks jurisdiction over events on U.S. soil. Yet even if part of our law, international law still generally emanates from a foreign source.¹⁵⁸ (3) Foreign opinion refers to the views of any non-U.S. based actor. The following chart lays out each type of foreign source and a sample of cases in which each source was consulted.

156. See Statute of the International Court of Justice, art. 38, 59 Stat. 1055 (1945), available at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>.

157. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

158. This statement holds true in 99% of cases, although some international law, such as that derived from general principles of law common to civilized countries could emanate from a provision of the U.S. Constitution common to many major constitutions.

	8th Amend	14th Amend	Copyright
Foreign Law	<p>—Foreign states' laws regarding the imposition of statelessness or denationalization as punishment (<i>Trop</i>)</p> <p>—Survey of foreign death penalty practices in relation to rape, mentally retarded defendants, and juvenile defendants (<i>Coker, Enmund, Thompson, Atkins, Roper</i>)</p>	<p>—Review of abortion laws throughout history (<i>Roe</i>)</p> <p>—Foreign countries permitting homosexual sodomy (<i>Lawrence</i>)</p>	
International Law	<p>—United Nations Convention on the Rights of the Child (<i>Roper</i>)</p> <p>—Three treaties including 1949 Geneva Convention (<i>Thompson</i>)</p>	<p>—EU Court of Human Rights (<i>Lawrence</i>)</p>	<p>EU directive instructing member countries to establish long copyright term (<i>Eldred</i>)</p>
Foreign Opinion	<p>—United Nations study on statelessness (<i>Trop</i>)</p> <p>—Amicus curiae brief from European Union (<i>Roper</i>)</p> <p>—Amicus curiae brief from the Human Rights Committee of the Bar of England and Wales (<i>Roper</i>)</p>	<p>—Amicus curiae brief from Mary Robinson, UN High Commissioner for Human Rights (<i>Lawrence</i>)</p>	

B. Areas of Law in Which the Doctrine Applies—the Importance of Thin Theory and Issue-by-Issue Analysis

The foreign source doctrine applies only to Cruel and Unusual Punishment and Due Process cases for two reasons: these portions of constitutional text are open-textured, and long-standing judicial interpretations of these portions of Constitutional text invite the consideration of foreign sources. Both of these conditions do not hold true for the Copyright Clause or matters of federalism, and it remains an open question whether these conditions might hold true for some other part of the Constitution in relation to which foreign sources have not been invoked by the Court.¹⁵⁹

With regard to the first condition, much of the Constitution consists of open-textured language, or language whose meaning is not clear from the words alone. By way of example, “cruel and unusual punishment,” “due process,” and “for limited times” stand in stark contrast to “the Senate of the United States shall be composed of two Senators from each State”¹⁶⁰ or “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁶¹ The meanings of the first group of phrases are arguably open to reinterpretation without amendment, whereas the meanings of those in the second group are not.

With regard to the second condition, the Court has, over the years, defined the meaning of some pieces of open-textured constitutional in terms that invite consideration of foreign sources. This is indeed a process, for it has not been the case—at least not outside of the context of the Copyright Clause—that Supreme Court Justices are willing to consider foreign sources without having prior judicial interpretations of the relevant provision on which they can build and upon which they can justify their choice. In this respect, it makes little sense to discuss the citations to foreign sources in Eighth Amendment cases without grappling with the caselaw that links it to human dignity and “evolving standards of decency that mark the progress of a maturing society.”¹⁶² Similarly, it is a poor discussion that brings up such citations in the Due Process context without regard to the caselaw linking the definition of

159. This is an area for future research, as an examination of judicial interpretations of all areas of constitutional text (e.g., evolving standards of decency in relation to “cruel and unusual punishment”) is beyond the scope of this Article.

160. U.S. CONST. art. I, § 3, cl. 1.

161. U.S. CONST. amend. XV, § 1.

162. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

rights included within due process to “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”¹⁶³ and without which a “fair and enlightened system of justice would be impossible.”¹⁶⁴ All of these formulations square with the notion expressed in *Hurtado* that our legal heritage, referring to the Magna Charta and the common law, does not “exclude the best ideas of all systems and of every age” and does in fact “draw its inspiration from every fountain of justice.”¹⁶⁵ Indeed, referring to our legal heritage, the 1819 case of *Bank of Columbia v. Okely* described the words of the Magna Charta as embodying the “good sense of mankind” about the need for individual freedom from the arbitrary exercise of governmental power.¹⁶⁶ It is worth noting that the right to due process and the prohibition against cruel and unusual punishment, as well as the notion of a written constitution, were legal transplants from this document.

It should not then be a surprise that after approximately 140 years of noting the relevance of great traditions inclusive of foreign experience, the Court would in 1958 finally consider foreign sources within the text of an opinion. As summarized in Part I above, the seeds of the foreign source doctrine can be found throughout our nation’s legal history, but these seeds did not bear fruit until *Trop v. Dulles*. The *Trop* plurality’s embrace of foreign sources in cruel and unusual punishment cases took hold in *Coker*, *Enmund*, and *Thompson*, was then rejected in *Stanford*, later reaffirmed by *Atkins* in 2002, and now cemented by *Roper*.¹⁶⁷ Although the foreign source doctrine is not applied as frequently in due process cases, there is no doubt about its application there, given *Roe*, *Lawrence*, and even *Clark*.¹⁶⁸ However, the purpose, extent, and effect of the citations to foreign sources are not the same in these two separate areas of law or even within different cases within the same area, as will be discussed in section C, below. The point of emphasis here is simply that the foreign source doctrine has a robust foundation in portions of our constitutional text, the earlier document from where this text was borrowed, the legal tradition of the common law, the Court’s early interpretations of our legal heritage, and the Court’s interpretation of cruel and unusual punishment and due process specifically. Key

163. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

164. *Id.*

165. *Hurtado v. California*, 110 U.S. 516, 531 (1884).

166. *Bank of Columbia v. Okely*, 17 U.S. 235, 243 (1819) (“[T]he good sense of mankind has at length settled down to this: that [the words of the Magna Charta] were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”).

167. *See supra* Part I.A.

168. *See supra* Part I.B.

moments in this historical evolution can be depicted as follows:

	Freedom from cruel and unusual punishment	Right to due process
Legal origin	English Declaration of Rights of 1688 and Magna Charta (<i>See Trop</i>)	Magna Charta (<i>See Hurtado</i>)
Supreme Court's view of the Magna Charta	—Embodies the “good sense of mankind.” <i>Bank of Columbia v. Okely</i> (1819) —Open to the “best ideas of all systems and of every age” and the common law process, which “draw[s] its inspiration from every fountain of justice.” <i>Hurtado v. California</i> (1884)	Same
Linkage of constitutional text to a greater tradition	“[D]erives its meaning from evolving standards of decency that mark the progress of a maturing society” and outlaws “fate[s] forbidden by the principle of civilized treatment” as defined in relation to the views of “civilized nations of the world.” “The basic concept underlying	The right is protected if part of a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” that is a right without which a “fair and enlightened system of justice would be impossible.” <i>Palko v. Connecticut</i> (1937).

	the Eighth Amendment is nothing less than the dignity of man." <i>Trop v. Dulles</i> (1958) (plurality opinion echoed essentially verbatim in <i>Atkins</i> (2002)).	
Greater tradition gives way to consideration of foreign sources	<i>Trop v. Dulles</i> (1958)	<i>Roe v. Wade</i> (1973)

(PASSAGE OF TIME, COMMON LAW EVOLUTION)

The foreign source doctrine formed through this combination of open-textured constitutional text, subjective judge-made law, and objective historical linkages between certain constitutional protections and broader legal and philosophical traditions. The doctrine then crystallized with relatively consistent insistence on foreign sources leading up to the recent high-profile cases reaffirming it in Eighth and Fourteenth Amendment cases.

Any understanding of (or debate about) foreign sources is incomplete if it does not take cognizance of the doctrine's origins in legal history and specific areas of jurisprudence defining our constitutional text in terms of greater legal and philosophical traditions. The doctrine is not capricious; rather, it is part of a long-standing practice of linking our constitutional traditions of Eighth and Fourteenth Amendment law to the broader projects of human dignity, fairness, justice, and individual freedom from governmental oppression. This practice, expressed in *Palko* and *Trop* and reaffirmed in recent years, seeks to both safeguard and define our rights through contextualizing them in principles and traditions that transcend the comparatively superficial concept of nationhood. It is notable, however, that this practice does not occur uniformly in constitutional law and is robust only in the areas of law discussed here.

Indeed, citations to foreign sources are aberrational or non-existent outside of the settings of the Eighth or Fourteenth Amendment. The majority's reference to European Union Copyright laws in *Eldred* would not have occurred but for the intention of Congress. Moreover, that

reference did not build on any past cases or constitutional text that invited consideration of foreign sources. It was sensible for the *Printz* majority to refrain from consulting foreign sources, since no constitutional provision or past caselaw invited the comparison. Of course, nothing prohibited foreign comparisons either. The propriety of citation to foreign sources in *Roper*, on the other hand, generates from the actual constitutional text—"cruel and unusual" does seem to invite comparison as does the long line of cases insisting on human dignity as the foundation of the Amendment itself. The same can be said of *Roe* and *Lawrence*, given the open textured language at issue and the caselaw interpreting it. In sum, the Copyright Clause and matters of federalism are not included within the foreign source doctrine because in these areas of constitutional law there is no widely-adhered-to legal principle pertaining to foreign sources. The fact that Congress might invite or mandate comparisons to foreign sources, as in the case of *Eldred*, matters little for the judicially-determined foreign source doctrine. In comparison to the Copyright Clause, widely-adhered-to legal principles counseling the consideration of foreign sources do exist in the areas of Due Process and Cruel and Unusual Punishment. Although the doctrine might also have taken root in other open-textured constitutional provisions that could be connected with the broader tradition of keeping individuals free from arbitrary governmental power, a foundation of caselaw has not been laid. Still, there is nothing to suggest that it could not eventually be laid, as in the case of the Fourth Amendment's prohibition on "unreasonable searches and seizures." But any innovations in the use of foreign sources would require many decades of common-law development in order to claim the sort of legitimacy possessed in other contexts. Let us now turn to questions of authority and usage.

C. Authority and Uses of Foreign Sources

1. Linking Authority to Usage

It is logical, given our American legal socialization, to ask whether the foreign source is authoritative or, on the other hand, cited simply because it is persuasive.¹⁶⁹ The following graph depicts the various

169. See Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFF., July-Aug. 2004, at 40, available at <http://www.legalaffairs.org/printerfriendly.msp?id=589>. Not even Justice Scalia alleges that the Court has treated foreign law as binding precedent, but foreign law could nonetheless be treated as having some precedential authority on the basis of a status accorded to the foreign court that decided the case. If this were the case, the situation would be analogous to a federal court of appeals weighing

levels of authority that might be granted to foreign sources:

**Degrees of Authority Illustrated in Terms of
Traditional American Conceptions**

4	Special Status—Authoritative Precedent (e.g., the holding of a superior court or prior case law of same court as in the cases of (a) an en banc court of appeals case for that same court of appeals, or (b) a Supreme Court case for the Supreme Court or any lower court). ¹⁷⁰
3	Special Status—Non-binding but Relevant Precedent (e.g., a federal court of appeals' discussion of a case from a different federal circuit)
2	No Special Status—Persuasive Authority (as in the case of a law review or treatise that influences the analysis)
1	No Special Status—Mere Ornament (e.g., law review article, treatise, case, or quotation of some notable individual—anything really—used merely as additional weight for or colorful illustration of a proposition already arrived at by the Court)

The authority granted to foreign sources is, if we are to believe the words of the majority opinions employing the doctrine, quite limited. This limitation owes to the narrow category of uses approved for foreign sources by Supreme Court caselaw.¹⁷¹ The relationship between usage

the decision of another circuit. If foreign law is cited merely because of its persuasiveness, however, and not its precedential value, this does not necessarily mean that we are then in that most inconsequential realm that Professor Yoo calls an ornamental use of foreign law. If the Court gives the foreign source the weight of a law review article or a treatise, it does not follow that the citation is merely ornamental even if the citation does not single-handedly change the outcome of the case. While an ornamental citation is mere window dressing, a way of indicating broader agreement with the Court's independent conclusion, a persuasiveness citation indicates that the source in question provided the Court with actual guidance in reaching its conclusion, even if the conclusion could not have been reached on the basis of the citation alone. In such a case, the relevant question is whether the foreign source was cited because of the independent value and persuasiveness of its reasoning, or because of a special status afforded by our Supreme Court to the foreign court rendering the decision or to the foreign body of law itself.

170. I do not mean to enter into the many variations on this theme (for example, to go on to list all the possible permutations of this category, or to explore the fact that the Supreme Court can overrule itself). The point is merely to delineate a category of precedent that is taken extremely seriously and will in all but the most exceptional cases be followed to the letter.

171. Namely, to help determine whether (1) a given practice is unusual, or contravenes evolving standards of decency and human dignity, and (2) whether it contravenes a fundamental principle of

and authority, while interesting in the abstract,¹⁷² will be considered only in the particular.

With regard to the U.S. Constitution, matters of usage and authority of foreign sources are implicit, and pre-established usages constrain authority. Examining a contrasting example illustrates the point. Authority and usage can be bestowed upon foreign sources by explicit constitutional text, as in the case of the South African Constitution:

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b. must consider international law; and
- c. may consider foreign law.¹⁷³

When this is the case, authority and usage are equally clear. The usage is interpretation of the bill of rights and the authority of international law is that of precedent that, although perhaps not binding, cannot be ignored. The authority of foreign law is also that of non-binding precedent, although it is precedent that need not be considered—similar to the status of a court case from a different jurisdiction. The term “must” in article 39(1)(b) indicates that international law constitutes precedent, while the term “may” in 39(1)(c) indicates a permissive use and implies a persuasive but not authoritative role for foreign law. The foreign source doctrine is simply the Supreme Court’s adoption of article 39(1)(c) in relation to foreign law, international law, and foreign opinion in the Eighth Amendment and Fourteenth Amendment questions described above.¹⁷⁴

justice rooted in our traditions or right without which a “fair and enlightened system of justice” could not exist.

172. The amount of authority possessed by a source might determine the array of uses to which that source may be put in an opinion. Authority may, however, be constrained by pre-established usages. And the use to which a source is put does reveal, at least for the purposes of the case under consideration, the level of authority granted to that source. A binding precedent can hardly be invoked by way of example in a case. It must be invoked as controlling authority and then may also be invoked as an example. A source invoked for the comparative purpose of proving an example of how another legal system has handled the issue under consideration by the court need not be given any authority whatsoever.

173. S. AFR. CONST. 1996, ch. 2, § 39(1). Also of note along these lines, although more responsive to the legislative context are sections 232–233 which state that customary international law “is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament,” *id.* ch. 14, § 232, and instructing courts to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation.” *Id.* § 233.

174. With 243 articles, the South African Constitution is far more specific than ours. And from its age of just ten years, it follows that its text could explicitly take stock of conditions of recent import, such as the growing importance of international human rights and the advent of judicial globalization. If such conditions are to register in the U.S. Constitution, judicial interpretation is needed.

In contrast to the South African Constitution, a use for foreign law came about gradually in the United States through judicial interpretation of amenable constitutional text. Foreign sources were cited only after a use or purpose for them was established by caselaw, namely to help determine (1) whether a given practice was unusual, or contravened evolving standards of decency and human dignity, and (2) whether it contravened a fundamental principle of justice rooted in our traditions or right without which a “fair and enlightened system of justice” could not exist. These Eighth and Fourteenth Amendment interpretations open the door for the Supreme Court to use foreign sources for the purpose of revealing how these interpretations apply in a given case. Thus, in the United States, it all begins with usage, and this usage does not authorize a level of authority for foreign sources that would permit their consideration outside of the pre-determined contexts.

2. Constitutional Interpretation as the Sole Usage

The foreign source doctrine provides that foreign sources may be used to interpret the Cruel and Unusual Punishment Clause and the Due Process Clause. This is all. In the Eighth Amendment, for example, one sees a weak form of constitutional interpretation in that foreign law merely confirms an existing domestic consensus. As the Court stated in *Roper*, the “opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions.”¹⁷⁵ But even if foreign sources are only confirming an already-existing domestic consensus in a “cruel and unusual punishment” determination, they have persuasive authority. Confirmation of the domestic consensus is sought not for the merely ornamental¹⁷⁶ purpose of a rhetorical flourish, but rather as the doctrinal consequence of an Eighth Amendment rooted in long-standing jurisprudential interpretations that transcend U.S. territory: human dignity and “evolving standards of decency that mark the progress of a maturing society.”¹⁷⁷

A weaker and less significant form of constitutional interpretation occurred in *Lawrence*, where the Court cited a European Court of Human Rights case. The purpose of this citation was to assess claims made in *Bowers*, an early Supreme Court case, about the treatment of

175. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

176. John Yoo suggests the possibility that the references to foreign decisions are merely ornamental—that is, used by the Justices “merely to illuminate or decorate their opinions.” Yoo, *supra* note 6, at 385.

177. *Trop v. Dulles*, 356 U.S. 85, 100 (1958).

homosexuals in Western Civilization. The *Lawrence* Court cited international law in order to explain that *Bowers* was wrongly decided on its own terms. It is not that a foreign decision overruled *Bowers*, but rather that the international cases cited proved that *Bowers* misread the status of the claim put forward in “our Western Civilization.” Although weak, this does count as a use of foreign law in constitutional interpretation, because of *Hurtado’s* and *Palko’s* grounding of due process in something broader than our domestic traditions led to the claims made in *Bowers*. The reason this use of foreign law is considered weak, despite its status as constitutional interpretation, is that it was grounded in a specific empirical claim made by an earlier Supreme Court decision. It is also weak because, as a general matter, its relevance is limited to our historical tradition and to openness to—as opposed to the compulsion of—*Hurtado’s* “best ideas of other systems.”

We must be careful not to confuse constitutional interpretation with comparative legal analysis. Constitutional interpretation refers to the task of interpreting a given section of text belonging to one country’s constitution. As seen above, portions of U.S. constitutional text are permissive of citations to foreign sources, but those sources are used to ascertain the meaning of U.S. constitutional text and Supreme Court precedent interpreting that text. They are not used to understand the differences and similarities between U.S. text and foreign text or to understand the likely consequences of one regime or another. True comparative analysis within the foreign source doctrine context occurs only in Justices Breyer’s and Steven’s dissent in *Printz*. There, they stated that other nations’ “experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.”¹⁷⁸ This is indeed a problem that warrants a comparative approach, as it is complex and our country could undoubtedly learn from how other countries have used law to reconcile these competing needs.

The individual rights cases, on the other hand, do not present a complicated legal problem. The Constitution either prohibits a certain practice or it does not. The task undertaken by the Justices is quite simply to determine the meaning of “evolving standards of decency” or “fundamental principles of justice.” When the Court looks to foreign countries on the question of executing juveniles or banning homosexual sodomy, it does so simply to survey whether these practices are

178. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

permitted or not. This is not comparative law in the doctrinal sense. Rather, it is a simple survey. The Court is not looking to the social and governmental consequences of banning these practices. It is merely looking to the state of the law around the world to determine what is cruel and unusual on the one hand and out of step with our traditions on the other.

Comparative analysis, by contrast, would state something along the lines of one approach's superiority over another for reasons made clear from the experience of another nation. It is not true comparative analysis simply to catalogue how many other nations execute juvenile offenders and to conclude on this basis that the existing U.S. practice was unusual. That others do or do not engage in a certain practice does not make that practice any more or less cruel. It may, however, make that practice more or less unusual. A judgment of unusualness is a simple factual observation made pursuant to our constitutional text, not pursuant to some insight derived from comparative legal analysis. In *Printz*, however, the dissenters wished to determine how federalism actually worked in other countries and to benefit from that foreign experience in fashioning our own laws. This is a proposal, albeit an unsuccessful one, for comparative legal analysis. Thus, the foreign source doctrine does not involve comparative law.

It can be said, however, that a certain comparison does take place in the Eighth Amendment context of a survey of foreign laws and in the due process context of ascertaining our legal heritage. The Court compares our practices to foreign practices to ascertain the state of "evolving standards of decency" and to shed light on whether a given practice is "unusual." The Court in *Roe* also took stock of foreign laws, namely those associated with our legal tradition, as is required in the due process context to assess consistency of a given right or prohibition with the principles of justice rooted in our traditions and conscience.¹⁷⁹

Because of these legal hooks on which references to foreign sources hang, it is logical that the foreign laws referenced by the Court would affirm human rights. I call this practice of only citing foreign laws that are more protective of human rights than the domestic practice under consideration "comparing up." It is natural that the Court would "compare up" instead of "comparing down."¹⁸⁰ One commentator has

179. See discussion of *Palko v. Connecticut*, *supra* notes 113–119.

180. Roger P. Alford's concern that "a robust use of international sources could have the unintended consequence of undermining rather than promoting numerous constitutional guarantees" seems politically savvy, for the foreign source doctrine could indeed be hijacked by conservative judges; however, this is unlikely given the disdain for which many social conservatives hold world opinion. Furthermore, his concern is not doctrinally well-placed because of the impropriety of comparing down. See Alford, *supra* note 6, at 58.

contended that we must “take the bitter with the sweet.”¹⁸¹ But to cite the laws of the Congo, Saudi Arabia, or United Arab Emirates in relation to the death penalty would accord neither with human dignity nor with the evolving standards of decency that mark a maturing society. These three countries still practice beheading.¹⁸² To cite the laws of Saudi Arabia or Iran on homosexuality, where it is an offense punishable by death,¹⁸³ would not only be outside of our legal tradition, but also outside the realm of any argument concerning conscience. Fundamentally, the phenomenon of comparing up rather than down is controlled by constitutional caselaw linking cruel and unusual punishment to “evolving standards of decency,” and due process to our legal heritage.

Downward comparisons could be imagined, however, if it were some day to pass that instead of lagging behind in its human rights practices the United States lurched ahead. Such hypothetical formulations as prison terms of more than ten years for murder being cruel and unusual per se or the assertion of a due process right to have an abortion on demand could certainly be rejected by virtue of downward comparisons to foreign laws. This sort of downward survey comparison would show that we were ahead of the evolving standards of decency and that ten-year prison terms for murder were certainly not unusual.

In sum, understanding the limited authority granted to foreign sources should contribute to greater rationality in the legal debate. Judge Posner’s view on this topic is in this sense quite reasonable:

I do not suggest that our judges should be provincial and ignore what people in other nations think and do. Just as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations’ laboratories from whose legal experiments we can learn. The problem is not learning from abroad; it is treating foreign judicial decisions as authorities in U.S. cases, as if the world were a single legal community.¹⁸⁴

Judge Posner’s objections arise only after foreign decisions are given a certain amount of weight by U.S. courts. As explained above, the foreign source doctrine does not treat foreign law and opinion as

181. Michael D. Ramsey challenges what he sees as a selective form of comparative law. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 70 (2004).

182. See Infoplease.com, *Capital Punishment: Here & Abroad*, <http://www.infoplease.com/spot/deathworld1.html> (last visited Feb. 17, 2007).

183. See SodomyLaws.org, *Hate Crimes: Like the Taliban, America’s Middle East Allies Tyrannize Gays and Women*, <http://www.sodomylaws.org/world/afghanistan/afnews006.htm> (last visited Feb. 17, 2007).

184. Posner, *supra* note 169, at 42.

authoritative; rather, it treats them as informative and it does so for good reasons.

D. Theories that Build on the Doctrine's Specificity

The following theories of the Supreme Court's use of foreign sources help illustrate the contributions of the narrow, issue-by-issue analysis offered in Part I and summarized in the preceding sections of Part II. These theories posit that the foreign source doctrine can be explained by any of the following: the Justices' political leanings, a lack of governmental accountability to marginalized interests (such as those of homosexuals and convicted criminals facing the death penalty), and globalization. The application of these theories benefits from the narrow analysis above. Context does in fact matter in this arena and broad positions on this issue run a considerable risk of invalidity, or, at best, fuzzy thinking.

1. The Justices' Politics

The easy answer, but for *Eldred*, would be that the Court has gotten it right with regard to finding a normatively justifiable place for foreign law in its decisions. Some parts of the Constitution, because of both text and caselaw, invite comparative approaches (the Eighth Amendment and the Due Process Clause), and others do not explicitly deny them (federalism and the Copyright Clause). The first complication is that the Eighth Amendment and Due Process doctrines presently allow comparisons to any effect other than decreasing the rights of U.S. citizens. The Court could have cited to the death penalty practices in China and Turkey to show that the standard at issue in *Atkins* was not cruel or unusual. If it wished to remain true to the language of "evolving standards of decency," however, it could not, have cited to those other nations' practices to show that our standards must be lowered. Though no doctrine in the Copyright Clause invites constitutional comparisons, the "limited times" restriction would similarly appear to forbid certain results—namely any permanent or quasi-permanent extension of authors' rights. The federalism issue in *Printz* varies from these other three areas of law, because no constitutional provision was on point.

The second complication derives from the curious fact that the portion of the Court most adverse to foreign law considerations was responsible for the only constitutionally impermissible result obtained through affirmative reference to foreign laws. One way to explain these two

complications involves entertaining the common conceptions of the justices' political leanings. The question is whether the palatability of foreign law depends on the results it is used to achieve.

The Feeney Resolution¹⁸⁵ exemplifies how politics has been brought to bear on the foreign source doctrine. The Resolution could very well be based on a passage from Chief Justice Taney's opinion in *Dred Scott v. Sanford*, where the Court affirmed the validity of slavery under the Due Process Clause. Taney remarked that

[n]o one, we presume, supposes that any change in public opinion or feeling. . .in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction. . .than they were intended to bear when the instrument was framed and adopted.¹⁸⁶

Chief Justice Taney's mandate was disobeyed in two subsequent Due Process Clause cases, *Palko v. Connecticut* and *Lawrence v. Texas*—discussed above.¹⁸⁷ These cases also fly in the face of the Feeney Resolution.

Yet, Feeney's politicization of this matter is not entirely misplaced. Politically liberal justices have indeed employed foreign sources in order to increase human rights protections in Eighth Amendment and Due Process cases or to decrease states' rights in the federalism context, but have avoided such reference to foreign law in copyright extension where it would lead to a smaller public domain. Conservative justices predictably followed the opposite course. Normative legal reasons for these positions bode mostly in favor of the liberals' positions, as discussed above, but so do the instrumentalist or ideological reasons mentioned here. This means the jurisprudence is both typical of a "disembodied order," one separated from politics, and an "embodied order," one ensconced in political life.¹⁸⁸

That Justice Scalia, of all the members of the Court, could join an opinion (*Eldred*) that ignores the clear textual language of the Constitution and focuses instead on legislative intent suggests the dominance of ideology over legal principles. Not only was it legislative intent, but it was legislative intent to consult the practices of foreign nations. If there ever were a case where Justice Scalia should dissent,

185. See *supra* note 5 and accompanying text.

186. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857).

187. See *supra* Part I.

188. See Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 225 (1981) ("[C]onstitutional order is seen as transcending—disembodied from—the clash of wills and movement of passions that characterize day-to-day political life. It may then be enforced on political life to discipline those wills and passions.").

this was it.

In *Printz*, where no constitutional provision on point could be found (unlike in *Eldred*), the Court should not have closed the door to comparative legal analysis. While no argument can assert that the Court would be obligated to look to foreign experience in the absence of a constitutional command or legislative request, it is inappropriate to rule out such an approach. The disagreement among the justices in this case might be seen as constitutive of either their commitment to comparative legal analysis in the abstract or to their positions on handguns or federalism. The analysis is indeterminate.

Indeterminacy also complicates Professor Koh's attempt to explain the foreign source doctrine in terms of a split between the nationalists and transnationalists on the Court.¹⁸⁹ A commitment to "territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law" would indeed constitute the sort of "force or will" that Justice Scalia claims judges should not have. Yet, his and Justice Thomas' opinions certainly do suggest such a commitment.¹⁹⁰ Justice Scalia's reference to foreign law in *Eldred* can be explained here on the basis of congressional intent that foreign law be considered in order to extend copyright protections to domestic authors. His lack of reference to foreign laws in Eighth Amendment cases does speak to his commitment to nationalism because foreign laws compromising human rights abound. In a sense, much foreign law agrees with Justice Scalia's values, yet he does not wish to avail himself of its support.

Still, the analysis is indeterminate because such foreign laws tend to emanate from countries with poor human rights records. Citing to them might prove politically disadvantageous. Moreover, the caselaw establishing constitutional tests of evolving standards of decency and traditions of Western civilization militate against citations to such countries' laws. And although it is tempting to say that the transnationalist judges citing to foreign laws are committed first and foremost to openness to foreign views, it is disingenuous to separate consideration of foreign law from the content of that law. It seems doubtful, for example, that Justices Breyer and Ginsburg would consult foreign law if there were no human-rights superior law to consult, or that *Palko* and *Trop* would have contained the broad statement of transcendental principles that they did if the world at large contained no kindred nations to which our notions of human dignity and fundamental

189. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52 (2004).

190. *Id.*

principles of justice could be tied.

It would seem that political preferences in relation to foreign law *per se* (nationalism vs. transjudicialism) are relevant, but the willingness of conservative Justices to interpret our Copyright Clause on the basis of foreign law detracts from this view. Admittedly, *Eldred* involved more of a competition between our laws and European laws, such that the majority hardly sought to affirm foreign law principles. Instead, the majority affirmed American competitiveness and congressional intent. Still, it was intent to interpret our Constitution in light of foreign practice.

Because the analysis of the Justices' politics is indeterminate, we must once again fall back on our case-specific understanding of how constitutional meaning has evolved to include the limited uses of foreign sources discussed above. The important textual and precedential grounds for the foreign source doctrine seem far more verifiable and amenable to principled analysis.

2. Process Theory

Continuing to test and explore the utility of the narrow approach at the heart of this Article, we can ask whether rationales for judicial review explain the consultation of foreign sources. It is noteworthy that the Court has properly affirmed the relevance of foreign law and practice only in the interpretation of "open textured"¹⁹¹ provisions, those that "not only allow, but invite fluid adjustment to changing circumstances."¹⁹² ("Limited times" is notably less textured than 'evolving standards of decency,' 'human dignity' or 'fundamental principles of justice.')

The controversy between the majority and dissent in *Atkins* revolves around what type of changing circumstances matters for constitutional analysis. The majority looked to evolving standards of decency, an "evolving popular consensus,"¹⁹³ instead of—as the dissenters would have it—the preponderance of legislative decisions by states in a static sense.

Both measurements, however, are difficult to identify in comparison to "an assessment of the responsiveness of government to particular interests,"¹⁹⁴ where a negative assessment justifies the anomaly of judicial review. The particular interests at hand are those of

191. See PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 31–43 (1975).

192. Parker, *supra* note 188, at 228 (discussing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)).

193. *Id.* at 231.

194. ELY, *supra* note 192, at 63–69 (as cited in Parker, *supra* note 188, at 231).

homosexuals, (*Lawrence*), the mentally retarded (*Atkins*), and juveniles (*Roper*), or simply a subset of convicted murderers with regard to the last two. If Justice Scalia is correct and the *Lawrence* majority was “tak[ing] sides in the culture war,”¹⁹⁵ this would be an appropriate place to do so under Ely’s conception of process theory. Query whether assessing the responsiveness of government to the interests of homosexuals or the mentally retarded is more “realistic and determinate” than ascertaining the existence of a popular consensus against capital punishment for the mentally retarded.¹⁹⁶ What is important here is not which is easiest to measure, but how under settled law constitutional interpretation must look to popular consensus in the Eighth Amendment context, but need not do so in the Due Process context.

Recall that Justice Scalia’s allegation in the Eighth Amendment context was not that the majority had taken sides in a culture war, but that it had placed more weight on an international consensus than on the national consensus. This folds nicely into former Chief Justice Rehnquist’s concern over federalism, however, because it seems that the *Atkins* majority—perhaps, in the interest of comity, humility, or fomenting the rule of law in foreign nations—effectively gave political input to international interests to which U.S. state governments are unresponsive. The contours of the law are such that different processes of constitutional interpretation will predictably arise in the language of opinions in each area of law, but perhaps without a practical difference. This is how Chief Justice Rehnquist’s objection on federalism grounds, though doctrinally misplaced, could be considered exceptionally astute.

Process theorists such as Choper and Ely consider the only value-neutral form of judicial review to be that of remedying barriers to minority influence over government decisionmaking—that is, correcting a procedural flaw in the political process, rather than “impos[ing] ‘substantive’ values on it.”¹⁹⁷ This “policing the system” approach to judicial review is also thought to address “systemic” as opposed to “ad hoc” malfunctioning.¹⁹⁸ Justice Scalia surely feels that a textual and literalist approach to law is also value-neutral and of a systematic (as opposed to “systemic”) nature, but he cannot claim that a *method of*

195. *Lawrence v. Texas*, 539 U.S. 558, 602 (Scalia, J., dissenting).

196. See Parker, *supra* note 188, at 231.

197. *Id.*, at 232. Cf. LAWRENCE H. TRIBE, CONSTITUTIONAL CHOICES 17 (1985) (“The crux of any determination that a law unjustly discriminates against a group—blacks or women or even men—is not that the law emerges from a flawed process or that the burden it imposes affects an independently fundamental right, but that the law is part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity.”).

198. Parker, *supra* note 188, at 232.

judicial review accounts for the very *necessity for judicial review*. The irony is that both rationales for judicial review were rejected by Justice Scalia and Chief Justice Rehnquist in the cases examined in Part I, above. The significance of this point requires elaboration.

The Supreme Court currently consults foreign laws and practice in constitutional interpretation that, depending on whether it occurs in the context of the Eighth Amendment or Due Process, invokes two separate rationales for judicial review. In the first context, the rationale is that of injecting the substantive values of an emerging consensus, whereas, in the second, the court corrected a flaw in the political process. What precisely was the flaw in the anti-sodomy statute? Process theory does not consider majoritarian politics to be a flaw. Rather, the flaw would be a defect in the functioning of that system because of discrimination, for example. In noting that the enforcement of the law served no legitimate governmental interest, the Court deduced a political malfunction. The “malfunctions” in *Atkins* and *Roper*, on the other hand, would have been to allow the application of outmoded and uncivilized value judgments to pass constitutional muster. This of course is not, doctrinally speaking, a malfunction, but rather a practice that has become “cruel and unusual” in relation to evolving standards of decency.

The elasticity of Eighth Amendment doctrine was demonstrated when the Court in *Atkins* noted quite openly that executing someone who is mentally retarded would not serve the stated objectives of the criminal law—deterrence or retribution.¹⁹⁹ This is at face value akin to noting that the anti-sodomy law in *Lawrence* served no legitimate governmental purpose and was therefore the result of a political malfunction owing to prejudice. Yet, in *Atkins* and *Roper*, the absence of a legitimate function made the laws “cruel,” while in *Lawrence* the same absence made the anti-sodomy law of inferior import than the petitioner’s liberty interests.

Though this elasticity and the seeming interchangeability of process theory criteria casts doubt on their precision in these areas of law, it cannot be said that the dissenters in these cases cared either way. The dissent did not argue in *Atkins* or in *Roper* that political malfunctioning had to be shown or that the substantive values asserted by the majority were undesirable per se; rather, the dissent argued in both cases that the judiciary could not strike down a law that formed part of a domestic consensus, period. In *Lawrence*, the dissent argued that substantive

199. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.”).

values relating to the prohibition of sodomy were irrelevant because *Bowers* was not premised not on a tradition of prohibiting sodomy, but rather on the lack of a tradition guaranteeing a right to engage in it.²⁰⁰ The dissent here does not care about malfunctions in the political process. Instead, it would require that the majority demonstrate a substantive tradition of allowing sodomy or a fundamental right to sodomy. Again, this demonstration would not be satisfactory if based on the assertion of the Court's values; rather, it had to find a basis in the *Palko* sense of our traditions and conscience.

Now the irony of the dissenters' position can be seen: It asserts a judge-created prohibition on the activity of judges. How can there be judicial review if neither a procedural nor substantive rationale for it suffices?

The objection to foreign sources in these two cases, therefore, should not be seen as relating to the use of foreign sources per se. Rather, it relates to the use of that law to demonstrate either a substantive or procedural need for judicial review. This rationale is difficult to absorb because the dissenters in *Atkins* and *Lawrence*, and even *Printz*, framed their objections to the use of foreign law in broad terms—that is, in terms of the irrelevance of foreign law and practice to U.S. law. If we look to *Eldred*, however, where consideration of foreign laws was mandated by Congress (read, “not judicial review”), we see that achieving international harmonization was more important than respecting actual constitutional text. Here, Justice Scalia and Chief Justice Rehnquist joined the Court in a decision that elevated the content of foreign law and practice in the area of copyright above our own Constitution's command on precisely the same subject.

The wonderful irony here is two-fold: First, Feeney's Resolution would allow Justice Scalia and Chief Justice Rehnquist to rely on foreign laws in order to defeat any view of the original meaning of the Copyright Clause simply because legislative history so permits; second, the Resolution decries the *Lawrence* decision in its preamble, but later permits the Court to rely on foreign law when such law “inform[s] an understanding of the original meaning of the laws.” The Due Process Clause has been considered by the Court for at least a century to comprise a notion of this country's tradition and a tie to the fundamentals of broader civilized society. How is the Court to ascertain the contours of this tradition and broader society without reference to other nations?

A narrow approach has thus enabled us to surmise particular relationships between foreign sources and judicial review that have

200. See *Lawrence*, 539 U.S. at 597 (Scalia, J., dissenting).

proved objectionable to the *Lawrence*, *Atkins*, and *Roper* dissenters. Without the benefit of the narrow approach, these relationships could not have been specified with sufficient precision. And without this, it could not be understood that the broad objections to foreign law fail to convey their authors' true meaning. Process theory affirms the validity of the narrow approach, illustrating the roles played by foreign sources in judicial review and how objections to judicial review may result in an overly-generalized vilification of foreign sources.

3. Globalization of Our "Living Document"

Here, the narrow approach enables globalization to be disaggregated into different content areas. How the Court will treat foreign law depends on the area of law in which the case arises and, relatedly, whether the composition of the Court permits the assertion of judicial review. Judicial invalidation of legislative judgment is deemed most acceptable in areas of individual rights and least acceptable in areas of economic policy. Citation to foreign laws and experience is currently allowed in the individual rights context and can therefore be deemed symptomatic of the globalization of human rights cited by Justice Breyer.²⁰¹ A similar reliance on foreign laws is also currently allowed in the interest of harmonizing economic policy, as seen in *Eldred's* treatment of copyright law. Matters of globalization are not implicated in the *Printz* case, leaving little reason besides true disinterested comparative analysis to consider foreign practices. There is no globalization of federalism that affects U.S. policy directly, but this is certainly not the case for European nations. Human rights and national economic policy, however, can forcefully insert themselves and related foreign ideas into previously domestic areas of decision.

The vehicles for this insertion are not equally valid as a normative constitutional matter, however. The open-textured language of Eighth Amendment and Due Process jurisprudence is a normatively acceptable vehicle. Pursuing the dictates of legislative history to the exclusion of Article I, Section Eight of the Constitution is not normatively acceptable. The presence of a globalizing influence in *Eldred* stretched to greater absurdity a constitutionally mandated limit on copyright. The absence of a globalizing influence is equally strong, however, defeating a sensible claim to the virtues of comparative legal analysis in *Printz*.

Invalidating legislative judgments in the Eighth Amendment or Due Process context has facilitated the globalization of human rights, since

201. See *supra* note 5 and accompanying text.

the United States lags behind some nations in the areas of capital punishment and, to a lesser extent, gay rights. Respecting legislative judgments regarding the effects of foreign rules in the Commerce Clause context, though in derogation of the Constitution's affirmative commands, also facilitates globalization. The form of process theory that accounts for this pattern can be labeled as a substantive or procedural vindication of globalization. Its major limitation is that the Court is not a uniform actor. Justices Stevens and Breyer most likely have a preference for individual rights over majoritarian politics, while Justices Rehnquist, Scalia and Thomas quite possibly have the opposite preference—all irrespective of globalization.

This theory's only chance for vindication lies with disaggregating globalization—for example, separating the globalization of human rights, from the globalization of intellectual property norms. This uncoupling of globalization is facilitated by the narrow analysis conducted in Part I and affirms the descriptive validity of the foreign source doctrine as described.

The preceding sections illustrate that the foreign source doctrine is best understood as the product of gradual common law development that, although certainly not divorced from politics (the politics of judicial review and globalization included), is firmly rooted in constitutional text and caselaw. It should also now be clear that the foreign source doctrine applies in very specific circumstances and is quite circumscribed. Indeed, the practice of consulting foreign sources must not be regarded as one-dimensional or a proper subject for easy argument or broad conclusions standing alone. The great enemy of the foreign source doctrine, and the principal obstacle to its comprehension, is this type of reliance on a broad position on the relevance of foreign sources to constitutional interpretation. Recall that a broad approach states either that foreign sources are always relevant to interpreting the Constitution or that foreign sources are never relevant. A broad position tends to come in the form of a "thick theory" justifying a broad view on the basis of deep-seeded legal or social assumptions. As seen below, these broad approaches do more harm than good, unless they account for and arise from a detailed understanding of the constitutional practice that has been painstakingly describe above.

III. PROBLEMS WITH BROAD POSITIONS: THE SUPREME COURT AND THE CONGRESS

Broad approaches to the issue of foreign sources have been common, despite finding a lack of support in the caselaw. Members of Congress,

the Justices themselves, and commentators are prone to making broad claims, and have suggested that foreign and comparative analyses have no place in the Court's jurisprudence or, conversely, that they may be central to the future of U.S. constitutional law. Such generalized conversations arouse fears and ignore the reality of what has occurred, making debate on the appropriateness of foreign sources either uninformed or inaccessible.

A. *The Justices*

Justice Scalia, in a public debate with Justice Breyer, noted the selective nature of the foreign sources surveyed in *Lawrence*. At the outset of course, he should have known that the international judicial decisions surveyed responded directly to the task of an earlier foreign reference made in *Bowers*, a decision with which he agrees. In any case, Justice Scalia accused the majority of selectively citing to foreign law instead of considering the practice of all foreign nations, not just those whose practices concord with the majority's views. He surmised that no other country applies the Exclusionary Rule, and asked why the Court should not therefore say "Oh my, we're out of step" and do away with the Rule.²⁰² Of course no principled basis for citing foreign sources in the context of the Exclusionary Rule had been suggested, and thus Justice Scalia's suggestion reflects a lack of awareness regarding the foreign source doctrine. In any case, he continued as follows: "[T]ake our abortion jurisprudence: we are one of only six countries in the world that allows abortion on demand at any time prior to viability[—]should we change that because other countries feel differently?"²⁰³ Justice Scalia is right to point out that the majority in *Roper* and *Atkins* "compares up," rather than "comparing down"—that is, they discuss foreign laws that are more rights-protective than the U.S. laws at issue in the cases.

This comment misunderstands the purpose to which foreign sources are put. No doctrine holds that the U.S. Constitution should generally bend to the practices of the world community. Whether those practices are common or rare is immaterial. Justice Scalia is responding to what he sees as a thick theory of foreign sources that would evaluate all areas of constitutional law in accordance with other nations' practices and mandate that our practices be kept in line with either the majority of

202. Antonin Scalia & Stephen Breyer, Assoc. Justices of the U.S. Supreme Court, Debate on Foreign Law at U.S. Association of Constitutional Law meeting at American University (Jan. 13, 2005), available at <http://www.freerepublic.com/focus/f-news/1352357/posts>.

203. *Id.*

foreign states or with some preferred minority of foreign states. In any case, this thick theory finds no support in the Constitution. It is nonetheless discernable from the comments of certain pro-foreign law Justices and this is precisely the problem with the public debate on this issue, even among the Justices themselves. It lacks careful attention to detail and contains an abundance of sweeping statements likely to inspire fear and misunderstanding.

The same could be said for Chief Justice Roberts' comments during his confirmation hearings. When questioned on the use of foreign law, he called it "a misuse of precedent" and noted that "[i]n foreign law, you can find anything you want," implying that there were no standards regarding which laws could be cited and for what purpose such citations could be made.²⁰⁴ He thus ignored the important textual and precedential foundations of the foreign source doctrine described in Parts I and II above.

Other Justices have espoused broad positions in favor of the doctrine. Former Chief Justice Rehnquist was, somewhat surprisingly given his dissenting opinion in *Lawrence v. Texas*, the first to speak publicly on the need for comparative constitutional analysis in the Court: "Now that constitutional law is solidly grounded in so many countries, it is time that the United States court begin looking to the decisions of other constitutional courts to aid in their own deliberative process."²⁰⁵ Justices O'Connor,²⁰⁶ Breyer,²⁰⁷ and Ginsburg²⁰⁸ have made comments to the same effect. Justice Breyer, for example, stated that the Court "find[s] an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of

204. See Mears, *supra* note 4.

205. William H. Rehnquist, Chief Justice of the U.S. Supreme Court, *Constitutional Courts-Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

206. See Sandra Day O'Connor, Assoc. Justice of the U.S. Supreme Court, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002) (opining that "[w]hile ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.").

207. Stephen Breyer, Assoc. Justice of the U.S. Supreme Court, *The Supreme Court and the New International Law*, Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (2003), available at http://www.humanrightsfirst.org/us_law/inthecourts/Supreme_Court_New_Interl_Law_Just_Breyer%20.pdf.

208. *Id.* at 1 ("[C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.") (quoting Ruth Bader Ginsburg, *Affirmative Action as an International Human Rights Dialogue*, 18 BROOKINGS REV. 2, 3 (2000)).

comparison.”²⁰⁹ Does he mean to say that foreign law should be consulted in other areas in addition to those already seen? Such broad statements certainly give cause for concern such as that expressed by Justice Scalia above.

Additional broad rationales for the foreign source doctrine cited by the Justices include, “the ‘globalization’ of human rights” and increasing consensus on human rights matters,²¹⁰ the ability of the United States to foment the rule of law in other countries,²¹¹ and a change in the United States’ “island” or “lone ranger” mentality, leading to an increased interest in comity and humility.²¹² Again, such comments, although perhaps accurate, are dangerously incomplete and lack any sort of limiting principles, such as those discussed in Parts I and II of this Article.

The Justices have indeed exercised varying degrees of caution in framing their comments. Justice Breyer was careful to spell out that “[i]t is neither that we are, in any political sense, ‘internationalists,’ nor are we trying to move the law in a particular substantive direction.”²¹³ He also specified that it is still the U.S. Constitution that the Court is interpreting and that the Justices will not “blindly follow” foreign law.²¹⁴ Justice O’Connor, on the other hand, made less qualified statements that did in fact lead to confusion and fear embodied in the Feeney Resolution. She predicted that “with time, we will rely increasingly on international and foreign law in resolving what now appear to be purely

209. *Id.* at 2.

210. *Id.* (“This change reflects the ‘globalization’ of human rights, a phrase that refers to the ever-stronger consensus (now near world-wide) as to the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist judges—i.e., independent judiciaries—as instruments to help make that protection effective in practice.”).

211. See Justice Sandra Day O’Connor, Remarks at the Southern Center for International Studies, (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf, at 2 (commenting that “[w]hen U. S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced.”).

212. See Ruth Bader Ginsburg, Assoc. Justice of the U.S. Supreme Court, Looking Beyond Our Borders: The Value of Comparative Perspective in Constitutional Adjudication, Sherman J. Bellwood Lecture (Sept. 18, 2003), in 40 IDAHO L. REV. 1, 2 (2003). (“The 1776 Declaration of Independence . . . expressed concern about the opinions of other peoples . . . out of ‘a decent Respect to the Opinions of Mankind.’”); *id.* at 8 (“[O]ur ‘island’ or ‘lone ranger’ mentality is beginning to change.”); *id.* at 10–11 (“I . . . believe we will continue to accord ‘a decent Respect to the Opinions of [Human]kind’ as a matter of comity and in a spirit of humility.”).

213. Breyer, *supra* note 207, at 1.

214. *Id.* (“[C]omparative use of foreign constitutional decisions will not lead us blindly to follow the foreign court. As I have said before—[o]f course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”).

domestic issues.”²¹⁵

B. The Congress

Together with the caselaw examined above, the Justices’ public statements and judicial opinions have led to the Feeney Resolution,²¹⁶ which is intended to overrule the foreign source doctrine. As if to leave no doubt as to the Feeney Resolution’s impetus, the notice for the legislative hearing on the Resolution quoted Justice O’Connor’s prediction regarding the Court’s increasing use of foreign law in domestic cases.²¹⁷

Eldred v. Ashcroft motivated the allowance made in the Resolution regarding legislative history.²¹⁸ Ironically, however, the decision in *Eldred* contravenes any reasonable conception of the original meaning of the “for limited times” language in the Copyright Clause.²¹⁹ Similarly ironic is the fact that a strong case can be made that what have (wrongly) been considered the Court’s most controversial usages of foreign laws—those occurring in recent Eighth Amendment and Due Process cases—fit within the Resolution’s broad exception relating to an “understanding of original meaning.” Since the Resolution fails to account for *Palko* and *Trop*, never mind the history behind the Eighth and Fourteenth Amendments, its purported normative concern for constitutional principles can hardly be taken seriously.

In his interview with MSNBC, Representative Feeney exhibited a similar lack of understanding of the weight afforded to foreign sources and the fact that consultation of foreign sources is appropriate only in certain areas: “[I]t is improper for [the courts] to substitute foreign law

215. O’Connor, *supra* note 206, at 351. Strangely, she followed this up with a doctrinally incorrect statement regarding the relevance of foreign practice to the Court’s Eighth Amendment jurisprudence that would point in the opposite direction from her prediction. *Id.* (“Until now, however, we have always held that when interpreting the meaning of cruel and unusual punishment, under the Eighth Amendment, only national norms are relevant.”). This is patently incorrect, at least as a descriptive assessment. See *supra* Part I.

216. See *supra* note 5 and accompanying text.

217. See Notice of Hearing on Feeney/Goodlatte Resolution, <http://www.judiciary.house.gov/legacy/news0324.htm> (last visited Feb. 18, 2007).

218. See 537 U.S. 186, 205–206 (2003) (explaining how Congress intended the Act to give American authors the same level of copyright protection afforded to European authors and to avoid competitive disadvantages vis-à-vis foreign rightholders. This case deals with the unification and standardization of intellectual property law for the purposes of international trade and commerce, but what is significant for our purposes is that the Justices looked to foreign law only to the degree Congress, through the vehicle of legislative history, had instructed them to do so).

219. U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). See also *supra* Part II.C.

for American law or the American Constitution."²²⁰ He then went on to suggest that judges who indulge in this impropriety should be impeached.²²¹ As we have seen, the Court is not *substituting* foreign law for our law; rather, it is interpreting our law and it may simply be beyond the comprehension of social conservatives that their Constitution and their founding fathers cannot in every case be properly comprehended without attention to the world at large. The point is not where the ideas came from, but rather who ultimately decides their value. Where our duly-appointed Supreme Court Justices believe they can learn something from foreign experience and they do so in the context of permissive, open-textured constitutional language and long-standing caselaw, it makes little sense to fear that they have delegated decisional authority to foreigners or substituted foreign law for U.S. law. It may actually be the case that they are exercising their duty to uphold the Constitution itself and that the foreign source doctrine is the result of this sincere attempt to faithfully apply our law. Moreover, it is in fact a valid application of our law.

IV. CONCLUSION

The foreign source doctrine has triggered some of the angriest and most sarcastic dissenting opinions in the history of the Court. Rabid disagreement, shrill voices, and inflamed sensibilities abound. This is not to say, however, that the issue should not be controversial, the disagreement not rabid, the voices not shrill, and sensibilities not inflamed, for one of the greatest controversies on the entire subject of constitutional interpretation is in fact implicated. This is the question of whether the Constitution is a living document. The foreign source doctrine is made possible by the Supreme Court majority's acceptance of the living document philosophy, that is whether the Constitution can accommodate changing values and conditions within American society, or, indeed, changing conditions in the world order. This formulation raises a subsidiary question within the living document theory. One may accept the premise that the Constitution's meaning can evolve over time without accepting that this evolving meaning may be in any part discerned through reference to foreign or international sources. The issue does not necessarily concern the original intent of the framers of the Constitution, for their original intent may have been for the Constitution to evolve along with the nation,²²² and they, in drafting the

220. Curry, *supra* note 2.

221. *Id.*

222. See Powell, *supra* note 95

Constitution most certainly consulted foreign views.²²³ Debates about the relevance of foreign experience to constitutional interpretation involve disagreement about whether the Constitution is a living document, and, second, additional controversy about the propriety of this particular way of breathing life into its text. Although I have confined my analysis to the latter, the narrower of the two issues, I must at least mention its relationship to this broader point of contention.

Where for over fifty years, majorities and dissenters have engaged in back-and-forth debate over whether due process and cruel and unusual punishment are protections that march forward or march backward, some honesty about law seems warranted. At issue are open-textured provisions—constitutional language that is brief and imprecise in its meaning. Examples of what is cruel and unusual are not given in the Constitution, as they would be in any code that purported to be absolute and unequivocal in its meaning. Furthermore, the Constitution nowhere specifies how it is to be interpreted. The dissenters' and Representative Feeney's position, even if original intent did weigh in their favor, seeks to derive comfort and legitimacy by removing choice. Yet, were their views to be adopted wholesale by all, this would constitute a choice—namely, a choice to ignore the roots and structure of the Eighth and Fourteenth Amendments, and to contravene many decades of Supreme Court jurisprudence. This choice would not give due consideration to the fundamental norms of human dignity and the principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

The foreign source doctrine is properly employed in areas of constitutional law where the text is open-textured and the precedent is amenable to it. As far as the meaning of the Bill of Rights is concerned, however, the obvious architecture at hand is one that counsels the protection of unpopular minorities, the evolution of human decency, and, of course, reflection on our country's cultural values. It does not follow, however, that this reflection need be limited to the most traditional subset of those values. As our society evolves, so does our law. The foreign source doctrine is not so out of step with our society as to be abusive of the Constitution as a living document. In fact, it seems perfectly in step with precedent and constitutional text. Further, the doctrine's application in Bill of Rights cases supports the purposes for which our Union was established in the first place—to ensure an end to tyranny, and to secure for all the rights to Life, Liberty and the pursuit of Happiness.

223. See Koh, *supra* note 87.

But I do not intend to say much about the policy debate here. This Article was intended to convey only half of the picture, the portion that reveals constitutional permissibility. I believe we should gaze upon this half before moving to the other portion which depicts the related matters of political and social desirability.²²⁴ Now that the salient aspects of the Supreme Court's use of foreign sources in domestic cases have been brought to light, it is indeed time to ask why the foreign source doctrine has gained prominence and whether it is desirable. Perhaps now we can ask these questions unencumbered by the accusations of illegality levied by unlettered legislators and incensed dissenting Justices. But as we ask larger questions—for example, those pertaining to the effects of the foreign source doctrine on sovereignty, individual rights, democratic legitimacy, the role of judges, and international relations—we must ensure that our answers account for the legal subtleties of the phenomenon with which we claim to be concerned. I do not contest the need for us, as a legal community, to consider the issue more broadly. I merely suggest that we ought to construct this debate, which is by nature relatively volatile and ideological, on top of more principled and dutiful lines of analysis. This Article is intended as a step in that direction.

224. See TRIBE, *supra* note 197, at 268 (“We must make choices but must renounce the equally illusory freedom to choose however we might wish to choose. For it is a Constitution . . . in whose terms we are, after all, choosing. And that is the paradox, the mystery, of the struggle we cannot avoid if it is the Constitution, and not solely our own priorities, that we would choose to follow . . .”).

